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in the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM JOSEPH HARVEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

August 27, 1986

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QUESTIONS PRESENTED

On October 20, 1980, the Government sought and obtained a Federal bug order under Title III of the 1968 Crime Control Act (18 U.S.C. §2510 *et seq.*) for RICO (18 U.S.C. §1961 *et seq.*) for marijuana, the relevant predicate offenses of which were 21 U.S.C. §§ 841(a), 846, for William Joseph Harvey's office to listen for 30 days. A prior State investigation, which immediately preceded the Federal bug, included a marijuana wiretap and a trash search that implicated Harvey. The Government also knew that Harvey would be out of town on a vacation for an unknown period of time. This information was not revealed to the judicial officer who issued the order. The Federal bug order required progress reports at five day intervals; the agents were instructed to minimize listening to unauthorized conversations, including to stop listening to the bug when named principals were not on the premises. Five progress reports were filed; they indicated no progress over a 21 day period. Neither the Government nor the supervising judicial officer stopped the listening. When Harvey returned from vacation, he was overheard—on November 19th—on the 26th day of the 30 day period. No order of approval for the disclosure of the Federal bug or the State wiretap was obtained by the Government before Harvey was indicted under 18 U.S.C. §§ 848, 952(a) and 963.

These facts raise these questions:

1. Did the failure of the Government to reveal the prior State wiretap violate 18 U.S.C. §2518(e), which requires an application for a bug to include a "full and complete" statement about "known" previous applications "involving" a person against whom an order is sought?

2. Did the failure of the Government to reveal the prior State wiretap and the trash search violate 18 U.S.C. §2518(1)(c), which requires an application for a bug to include a "full and complete" statement about "other investigative procedures"?

3. Did the failure of the Government to reveal that Harvey was out of town violate 18 U.S.C. §2518(1)(b), which requires an application for a bug to include a "full and complete" statement of "belief" about "probable cause"?

4. Did the failure of the Government or the supervising judicial officer to stop the listening after 21 days of no progress violate 18 U.S.C. §2518(6), which provides for "reports . . . showing . . . progress toward the achievement of the authorized objective and the need for continued" listening?

5. Did the failure of the Government to obtain orders of approval for the disclosure of the Federal bug and the State wiretap violate 18 U.S.C. §2517(5), which provides that an "application" must be made for an order of approval to "disclose . . . " a "wire or oral communication . . . relating to offenses other than those specified in the order of authorization . . . "?

6. Did the Government fail to follow the supervising judicial officer's minimization instructions that were required by 18 U.S.C. §2518(5), which provides that an "order" must "contain" a "provision" that listening "shall be conducted . . . [so as] to minimize the interception" of "communications" not "subject to interception"?

7 Did the conduct by the Government of the listening lack a showing of present probable cause, necessity, and particularity, which are required by the Fourth Amendment?

8. Did the failure of the Government to reveal to the supervising judicial officer the prior State wiretap, the trash search and Harvey's absence violate the Fourth Amendment?

9. Does Title III, as interpreted and applied, authorize unreasonable searches and seizures, which are prohibited by the Fourth Amendment?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 789 F.2d 1492. It is reproduced in the Appendix to this Petition at App.pp. 1-51. Harvey's request for a rehearing by the panel or the court en banc was denied; see Eleventh Circuit slip opinion 4519. It is reproduced at App.pp. 52-54. The opinion of the District Court is reported at 560 F.Supp. 1040. It is reproduced at App.pp. 55-160.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1986. Harvey's request for a rehearing was denied on July 25, 1986. This Petition has been filed within sixty (60) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are lengthy. Their pertinent text is reproduced at App.pp. 161-188.

Their citations are:

18 U.S.C. §1961 *et seq.*

18 U.S.C. §2510 *et seq.*

21 U.S.C. §§841(a), 846, 848, 952(a), 963.

STATEMENT OF THE CASE

On February 9, 1982, a twenty-three count indictment was returned in the United States District Court for the Southern District of Florida, in Miami, charging William Joseph Harvey and eighteen co-defendants with violations of 21 U.S.C. §§ 848, 963, 952(a), 846 and 841(a)(1). Harvey and the others filed, on July 7, 1982, a motion to suppress the evidence obtained from a series of Federal bugs and a State wiretap. After a four day hearing and a one day argument, the United States District Court denied the motion. 560 F.Supp. 1040. Harvey went to trial on a stipulated transcript and was convicted of 21 U.S.C. §846. 789 F.2d 1492. Harvey appealed to the Eleventh Circuit Court of Appeals. His appeal and petition for rehearing were denied. *Id;* slip opinion 4519.

REASONS FOR GRANTING THE WRIT

1. *The Increasing Use And Shifting Character Of Wiretapping And Bugging In The Current Law Enforcement Effort To Control The Drug Traffic Requires The Active Intervention Of This Court To Resolve Conflicting Decisions, To Bring Together Diverging Practices, And To Assure That The System Of Careful Judicial Supervision Mandated By The Constitution And Statutory Law Is Upheld In Practice.*

The Government has launched a "War on Drugs." It is taking place at the Federal, State and local levels. The President has declared, "It's war to the end." *The Washington Post*, Dec. 6, 1984, p.4. Principal battlefields are in South Florida and Latin America. Major weapons in the law enforcement war include wiretapping and bugging. Since 1980, their use has dramatically increased and shifted in character. Increasingly, individuals are subjected to longer periods of more intrusive listening—without a correspondingly heightened judicial supervision, as this petition will demonstrate. As such, a pressing need exists for this Court to intervene to reinvigorate constitutional and statutory safeguards, which are being drained of vitality by law enforcement agents and courts bent on fighting drugs without regard to other values.

Until 1980, the Government operated under an informal limitation of not more than 100 wiretap or bug orders per year. Today, that figure is almost 2½ times as high.[1] Before 1980, gambling was the principal offense under investigation, the initial period of listening averaged only 21 days, only 25% of the orders were extended, only 65 people were overheard, and as much as 36% of the conversations were incriminating.[2] Today, twice as many orders are issued for drugs as for gambling, the initial period of listening has risen to 25 days, 57% of the orders are extended—the total number of days of listening has almost doubled—105 people are overheard, but only 20% of the conversations are incriminating.[3] In fact, one Federal wiretap lasted an incredible 453 days.[4] The Government, too, is increasingly using bugs as well as wiretaps, and it is placing them in single family dwellings and apartments as well as businesses.[5] If this law enforcement activity were subjected to the sensitive scrutiny of an independent judiciary, it would be no doubt distasteful, but it would be, at least arguably, necessary. Unfortunately, it is both distasteful and, as practiced, unnecessary.

It is too bad, but sometimes the morals of war result in the violations of basic human rights. This petition for certiorari is about one such casualty, William Joseph Harvey. But it raises important questions of conflicting law between the Circuit Courts of Appeal and State appellate courts and divergent practices that transcend the unjustifiable and unjustified invasion of Harvey's privacy in the name of drug control. The enemy in the "War on Drugs" includes not only people in Latin America, but people in the United States, who are, unlike those in Latin America, protected in basic rights by the United States Constitution and duly enacted legislation. One item of such legislation is Title III of the 1968 Crime Control Act (18 U.S.C. §2510 *et seq.*), which was the product of a careful compromise by Congress of the interests of privacy and law enforcement, the keystone of which was a carefully crafted system of judicial supervision. This petition tests the degree to which that system of judicial supervision can be realized in practice in a time of law enforcement war. It takes the blunt position that without the active intervention of this Court, the promise of the 1968 compromise of a balanced system, which recognized each of the various conflicting values in any scheme of police surveillance in a free society, will not be realized.

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[1] *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications: Administrative Office of the U.S. Courts,* Table 7 (1986) (hereinafter *Administrative Report*).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 3.

[5] *Id.* at Table 6, Table 7.

This Court has decided seven major decisions under Title III, the most recent of which came in 1978.[6] It is time now to make a comprehensive reassessment of changing law and practice. This Court has the benefit of the American Bar Association Standards on Electronic Surveillance,[7] the empirical work of the National Commission For the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance,[8] and a mature body of legal commentary.[9] The factual and legal record in this legislation has been thoroughly developed by knowledgeable counsel for the Government and Harvey. The issues have been fully briefed and decided on the merits by the lower courts. In fact, this petition raises more—and more substantial—issues under Title III than any previous litigation known to these experienced counsel. The issues, too, are fully ripe for adjudication—and they come at a crucial juncture in the use of wiretapping and bugs by the Government to suppress the drug traffic.[10]

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[6] *United States v. United States District Court*, 407 U.S. 297 (1972); *United States v. Kahn*, 415 U.S. 143 (1974); *United States v. Giordano*, 416 U.S. 505 (1974); *United States v. Chavez*, 416 U.S. 562 (1974); *United States v. Donovan*, 429 U.S. 413 (1977); *Scott v. United States*, 436 U.S. 128 (1978); *Dalia v. United States*, 441 U.S. 238 (1978).

[7] *Electronic Surveillance: American Bar Association Project on Standards For Criminal Justice* (1971) (hereinafter *ABA Standards*).

[8] *Electronic Surveillance: Report of the National Commission For The Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance* (1976) (hereinafter *Wiretap Report*).

It is doubtful that this Nation can achieve a drug free status through law enforcement alone.[11] It would be a tragedy of the first order, however, if its success in achieving one freedom came at the price of the loss of another freedom. The humor is macabre, but it is sometimes sardonically suggested that all the Government has to do today to win a drug prosecution is show up and say, "Drugs." If the administration of justice in this important area is to be, not only administration, but also justice, it will only come about if this Court reinvigorates and enforces the standards set by the Constitution and the Congress until they are changed by the normal constitutional and legislative processes. The sort of result-oriented fact finding and the similar rewriting of duly enacted legislation that is present in this record must come to an end. What is at stake is no less than the rule of law. This petition offers this Court, in short, a unique opportunity to set the right tone for a *lawful* war on drugs.

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[9] *See, e.g.,* J. Carr, *The Law of Electronic Surveillance* (1977) (hereinafter *Carr*); Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance,* 74 *Journal of Crim. Law and Criminology* (1983) (hereinafter *Goldsmith*).

[10] While this petition focuses on the Government's efforts, a decision on the merits by this Court will be fully applicable to the thirty-two states, which have enacted State statutes under Title III and which are increasingly using them. *Administrative Report* at Table 1.

[11] *America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime, President's Commission on Organized Crime,* 5-13 (1986).

2. *The Failure Of The Government To Reveal The Prior State Wiretap Violated 18 U.S.C. §2518(1)(e).*

Under 18 U.S.C. §2518(1)(e), an application for a bug must include a "full and complete" statement about "known" previous applications "involving" any of the same persons. Harvey was named in the prior State wiretap application, and he was overheard on the wiretap. Neither item of information was included in the application for the Federal bug. The District Court sought to excuse this failure by finding as a fact that the Government neither knew Harvey was named nor overheard. 560 F.Supp. at 1068-73. The District Court also sought to avoid the impact of Section 2518(1)(e) by finding that the failure was "inadvertent." 560 F.Supp. at 1070. The fact of the State wiretap, albeit not Harvey's involvement in it, was included in page 21C of the applying agent's affidavit, prepared for submission to the court, but not found in the affidavit when it was unsealed. 560 F.Supp. at 1069-70. The text of page 21C is reprinted in 560 F.Supp. 1040. The Court found that there was "no evidence [in the record] that establish[ed] how page 21C came to be missing . . . ." 560 F.Supp. at 1070. As such, the omission could not be a violation of Section 2518(1)(e). The Court of Appeals, while conceding that the record[12] established that the Government agents "knew that Harvey had been intercepted," 789 F.2d at 1499, upheld the District Court's finding, as not clearly erroneous, that the agents "did not know that Harvey was a named target . . ."[13] 789 F.2d at 1500. The Court went on to decide, moreover, that an inadvertent omission of material required to be disclosed by Section 2518(1)(e) does not require suppression, since it does "not relate to the legal determination the judge must make." *Id.*

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[12] In fact, the agent's knowledge that Harvey was "an interceptee" was brought out "beyond question" by the interrogation of FBI agents by the District Court itself. (Vol.23 pp.1059-60 of Record).

Section 2518(1)(e), however, does not say that the Government had to "know" that Harvey was "named." It says "involved." If it is conceded that the Government "knew" he was "intercepted," he was "involved." As such, that fact had to be disclosed to the judicial officer if the applications were to be "full and complete." Similarly, "know" ought to be held to include not only "actual" knowledge, but "willful blindness." Surely, the Government ought to be held to the same standard of "knowledge" as drug traffickers. *See, e.g., United States v. Jewell,* 532 F.2d 697 (9th Cir. 1976) (en banc) (knowingly within §952(a) includes "willful blindness"). Section 2518(e), moreover, does not distinguish between "advertent" and "inadvertent" omissions. It places an unqualified duty on the Government to make a "full and complete" disclosure to the judicial officer of the known facts relating to previous applications. Even had page 21C been included in the application, however, it would still have omitted that Harvey was involved in the State wiretap. Either way, the application was not "full and complete."

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[13] No appellate court ought lightly to set aside the findings of a lower court. But if the clearly erroneous rule is to have any meaning in the context of a motion to suppress, a "district court's account of the evidence . . . [that is not] plausible in light of the record viewed in its entirety . . . ," *Anderson v. City of Bessemer,* 105 S.Ct. 1504, 1512 (1985), ought not be "insulate[d] . . . from review by denominating . . . [it a] credibility determination [. . .]" *Id.* at 1512. If this petition merely represented a single instance of bad fact finding by a District Court and a misapplication of the clearly erroneous rule by a Court of Appeals, it might not merit this Court's attention. The fact finding and the appellate review here, however, took place in the context of a similar twisting of the law, and it represents a systemic problem in drug prosecutions. The police have a saying: "A little perjury goes a long way in a good cause." Here it might be appropriate to say: "If you let me find the facts and rewrite the law, civil liberties will never be violated." Harvey is prepared to demonstrate that the facts found below were clearly erroneous; he is also prepared to accept the facts as found and demonstrate that the law was wrongly interpreted and misapplied.

In any event, the District Court improperly placed the burden of going forward with evidence of why the paragraph was missing on Harvey in light of this Court's decision in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). Once Harvey showed that page 21C was missing, the burden shifted to the Government to explain why. It did not. Recklessness should have been inferred, therefore, from an unexplained omission. *United States v. Martin*, 615 F.2d 318, 327-29 (5th Cir. 1980). "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devises." *Berger v. New York*, 388 U.S. 41, 63 (1967). Submitting an affidavit to a judicial officer for a bug without knowing that it is complete or not is recklessness in the classic sense of the term, factually and legally. *See Commonwealth v. Pierce*, 138 Mass. 165, 175-76 (1884) (Holme, J.) ("indifference to what . . . [the] consequences may be").

In addition, the holding of the Court of Appeals that an omission of known information required to be included by Section 2518(1)(e) does not warrant suppression places it squarely in conflict with *United States v. Bellosi*, 501 F.2d 833, 835 (D.C. Cir. 1974), a decision that the Court of Appeal avoided by dismissing it as "unpersuasive," 789 F.2d at 1500 n.6. In fact, *Bellosi*, and not the Court of Appeal's opinion, is persuasive. *See ABA Standards* at 137; *Wiretap Report* 68; *Carr* pp.187-88; *Goldsmith* p.43.

Finally, the fact of prior surveillance did relate to the necessity finding that the judicial officer had to make, despite the Court's observation that the prior State wiretap made the federal bug "neither more nor less necessary." 789 F.2d at 1500 n.6. As it will be more fully developed below, the existence of the State wiretap bore on the need to conduct *additional* surveillance. The judicial officer was entitled to information about Harvey's involvement in the State wiretap, so that it could make a necessity judgment before the Federal bug was put in. Judicial officers in the first instance, not agents or appellate courts, must make the finding of need. *Illinois v. Gates*, 462 U.S. 213, 240 (1983). Indeed, not telling the judicial officer of the State wiretap and Harvey's involvement in it deprived him of the *opportunity* to request additional facts about it under 18 U.S.C. §2518(2). This Court must intervene and right these decisions if Section 2518(1)(e) is to regain the vitality it had when Congress enacted it in 1968.

3. *The Failure Of The Government To Reveal The Prior State Wiretap And The Trash Search Violated 18 U.S.C. §2518(1)(c).*

Under 18 U.S.C. §2518(1)(c), an application for a bug must include a "full and complete" statement about "other investigative" procedures. No requirement of a state of mind is set out. Harvey was named in the prior State wiretap, intercepted on it, and subjected to a trash search. None of this information was included in the Federal application. Harvey argued in the District Court, therefore, that an adequate showing of necessity had not been made.[14] The District Court passed over Harvey's argument on this point. The Court of Appeal responded to it in a footnote. 789 F.2d at 1500 n.6. The Court believed that Harvey was arguing that "*any* omission of a prior investigative effort required suppression." *Id.* Harvey contends, however, only that the text of the statute should be read to mean what it says: "full and complete." All information that is arguably relevant ("full") and not manifestly redundant ("complete") must be included. The State wiretap, Harvey's involvement in it, and the trash search were neither arguably irrelevant nor manifestly redundant. Each bore on the need for the *continuation* of an extraordinary investigative technique against Harvey. At a minimum, the judicial officer ought to have had the opportunity to evaluate whether or not normal investigative techniques used in light of what had been already obtained by the use of these other investigative techniques, *one of which was a wiretap*, could have accomplished the agents' objectives without *further* wiretapping or bugging. *See, e.g., United States v. Lilla*, 699 F.2d 99, 102-05 (2d Cir. 1983) ("use of the wiretap [must be more than] merely a useful additional tool"). Using the existing wiretap and the trash search materials in the context of grand jury interrogators under immunity grants might well have sufficed to accomplish the agents' objectives. The judicial officer needed to have at least this much information if he was to make an informed decision himself. Section 2518(1)(c), too, does not qualify its text by "known," as does Section 2518(1)(e), or "belief," as does Section 2518(1)(b). Some element of strict liability—necessity in fact—must have been intended. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (language included in one section, but omitted in another, reflects intent).

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[14] Harvey's argument in the District Court focused, not only on what had been omitted, but also on the form in which evidence had been presented to the judicial officer. In addition to setting out facts, the Government agents offered opinions to the judicial officer—as to the feasibility of various alternative courses of action. Harvey argued that an insufficient basis had been set out in the affidavits for the agents to offer such expert opinions. The point was rejected by the District Court and the Court of Appeal. 560 F.Supp. at 1055-57; 789 F.2d at 1496-98. This issue, too, may be fairly thought to be a subsidiary question raised in this petition on the point of necessity.

Language in this Court's opinions reflects a sensitive awareness of the importance of the showing of the exhaustion of alternative investigative methods. *Dalia v. United States*, 441 U.S. 238, 250 (1979) ("genuine need"); *United States v. Giordano*, 416 U.S. 505, 515 (1974) ("restraint . . . not to be routinely employed"); *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974) ("[N]ecessity [must be] shown . . ."). Unfortunately, the lower courts have tended to reduce this requirement to "one of investigative utility, rather than necessity." *Carr* at 179. *See also Wiretap Report* at 14 (Too "often [the requirement] has . . . been met by standardized language . . . ."); *Goldsmith* at 127 ("boilerplate . . . the norm"). This Court has never decided an appeal on this important issue. This petition offers an excellent opportunity to this Court, therefore, to reinvigorate the original understanding of the 1968 Act on the point of necessity, which is at the heart of the rationale for the use of wiretapping and bugging.

4. *The Failure Of The Government To Reveal That Harvey Was Out Of Town Violated 18 U.S.C. §2518(1)(b).*

Under 18 U.S.C. §2518(1)(b), an application for a bug must include a "full and complete" statement of "belief" about "probable cause." [15] Harvey was out of town at the time the application was made on an unscheduled vacation; the Government had no idea of when he was to return. The application submitted to the judicial officer did not include this information in it, although it was noted in page 21C, which was not in the application, as noted above. Neither the District Court nor the Court of Appeals treated the failure to include page 21C in the application or the point of Harvey's absence from town as a separate statutory violation of the duty to make a "full and complete" statement of "belief" relating to "probable cause" under 18 U.S.C.

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[15] The District Court decided the issue of probable cause under the regime of *Aguilar v. State of Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). 560 F.Supp. at 1050-53. The meaning of "probable cause" within the Fourth Amendment today is governed by *Illinois v. Gates*, 462 U.S. 213 (1983), which has been held to be retroactive. *Massachusetts v. Upton*, 104 S.Ct. 2085, 2087-89 (1984). Title III, however, governs here. Congress embodied *Aguilar-Spinelli* in it. S. Rep. No. 1097, 90th Cong. 1st Sess. 100-02 (1968). Until Congress indicates a change of mind, the old regime remains the law for wiretapping and bugging. *See Helvering v. Griffith*, 318 U.S. 317, 394-95 (1943). The Tenth Circuit has reserved decision on this issue. *United States v. Newman*, 733 F.2d 1395, 1399 (10th Cir. 1984). Other circuits are uncritically assuming that *Gates* applies under Title III. *See, e.g., United States v. Griffin*, 726 F.2d 852 (1st Cir. 1984). This issue, which was passed over in silence by the Court of

§2518(1)(b). Instead, each analyzed the issue as a constitutional matter under *Franks v. Delaware*, 438 U.S. 154 (1978). 560 F.Supp. at 1074-75; 789 F.2d at 1499. This petition will treat the constitutional issue subsequently. Here, as above on the question of the prior State wiretap and necessity, Harvey contends that the failure to include this crucial item of information of belief violated the plain language of Section 2518(1)(b). Here, too, an authoritive reading of Section 2518(1)(b) is needed.

5. *The Failure Of The Government Or The Supervising Judicial Officer To Stop The Listening After 21 Days of No Progress Violated 18 U.S.C. §2518(6).*

Under 18 U.S.C. §2518(6), an order for a bug "may require reports to be made . . . showing what progress has been made toward achievement of the authorized objective and the need for continued interception." S. Rep. No. 1097, 90th Cong., 2nd Sess. at 103-04 (1968) explained that the purpose of such reports was to check on "the need to conduct surveillance" and to "serve to insure that . . . [it] was not unthinkingly or automatically continued . . . ." The bug order

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(Footnote 15 Continued)

Appeals, 789 F.2d at 1498, also needs to be resolved, and it is raised in this petition. Its significance, moreover, is potentially fatal to the Government. If inadequate probable cause existed to justify listening for the non-drug predicate offenses under RICO, the bug will fall, for marijuana is *not* a drug for which RICO authorizes surveillance. The reasoning behind this contention is set out, but rejected, in *United States v. Bascaro*, 742 F.2d 1335, 1342-43 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 3476 (1985). The bug must then rest on the drug offenses alone. But the FBI agents, who conducted the listening, were *not* authorized to conduct drug investigations until February 3, 1982. *See* Fed. Register No. 23 p.4989. As of October 20, 1980, 28 C.F.R. §§ 0.85 and 0.100, together, assigned drug investigations *solely* to DEA, and 18 U.S.C. §2510(7) provides that only law enforcement agents empowered to conduct the investigations for offenses under surveillance may operate a bug. As such, the entire surveillance was not authorized by Title III.

was signed on October 20, 1980; an amended order was issued on October 22, 1980. Listening began on October 24, 1980. Progress reports were required at five day intervals. The first report was dated October 27, 1980; it did not indicate that listening had begun. The second report was dated October 29, 1980; it indicated that listening had begun, but that "no significant" conversations had been overheard from October 24th through October 28th. The supervising judicial officer was also informed that Harvey was "out of the South Florida area . . . [but he was] expected to return on October 29, 1980." The third progress report was dated November 4, 1980; it indicated that "[n]one of the persons named in the order were identified . . .", although conversations had been overheard; it also indicated that "the principals [had] been staying out of the South Florida area . . . [but were] expected . . . [to] return shortly." The fourth progress report was dated November 12, 1980; it reported no progress; it also indicated that it was the position of the Department of Justice in Washington that an extension of the order would be sought "only upon obtaining reliable information that the subjects . . . [were] back in town [and that] such information . . . [would] be available within several weeks." The fifth progress report was dated November 14, 1980; it indicated no conversations were overheard between November 11, 1980 and November 13, 1980.

Harvey argued in the District Court that the absence of progress—21 days out of a 30-day period—the "principals," (Harvey included) were out of town—"reliable information" of their return was "several weeks" away—no "significant" conversations had been obtained—mandated that the listening stop at the point of the fifth, if not the fourth, progress report. The District Court held that since the progress reports were discretionary, their sufficiency was a matter for the supervising judicial officer. 560 F.Supp. at 1054. In addition, it found Harvey's absence of no significance, since "[t]hree employees . . . were named as possible coconspirators, and they might well have had access to and use of the office in Harvey's absence." 560 F.Supp. at 1074. The Court of Appeals agreed; it also held that the "proper time" to reconsider the probable cause "would be at the end of the thirty days . . . ." 784 F.2d at 1498. It also concluded that "there . . . [was] no factual basis in the record for . . . [Harvey's] contention that current probable cause did not exist." *Id.* at 1499 n.3.

The holdings of the District Court and the Court of Appeals that others might use Harvey's office in his absence to discuss criminal matters were without a factual basis in the affidavits; they were also wholly refuted by the progress reports themselves, as quoted above. Nor does the record support, as it is amply set out above, the Court of Appeal's incredible suggestion that "no factual basis" existed for Harvey's contention that current probable cause to justify the continuation of the listening no longer existed in light of progress reports that showed no progress. The holdings of the District Court and the Court of Appeals, both of which are legal in character, and neither of which are governed by the clearly erroneous standard, *Pullman Standard v. Swint*, 456 U.S. 273, 287 (1982), make a mockery of the text of the statute, its authoritive construction in its legislative history, and the record in this litigation. As a matter of interpretation of the law, they are inconsistent with *Howard v. State*, 51 Md. App. 46, 58, 442 A.2d 176, 188 (1982). They constitute, moreover, pernicious precedent that bodes ill for privacy, where extended surveillance is undertaken. The Third Circuit in *United States v. Cafero*, 473 F.2d 489, 495 (3rd Cir. 1973), *cert. denied*, 417 U.S. 918 (1974), the leading decision upholding the constitutionality of Title III against the objection of lengthy and unsupervised listening, conditioned its decision on a different reading of Title III:

> (1) The length of interception in each case [is to] be determined by judicial decision on a case by case basis; (2) the interception [must] be terminated automatically, not necessarily on a predetermined calendar date, . . . when the objective . . . is

> achieved . . . and (3) while there is a maximum statutory life span of thirty days for each approval order, each interception has the very real potential of earlier extension [under the progress report provisions.]

No aspect of this petition is more pressing than the need for this Court to breathe life into Title III's progress report system, from which these misguided lower court decisions have drained all vitality. *See Wiretap Report* at 96-97 ("check on the information previously presented to the judge, and as a deterrent to long surveillance"); *Carr* at 267 ("their purpose is not satisfied unless they are diligently reviewed"); *Goldsmith* at 136 ("should . . . [the] reports reveal the loss of probable cause, termination . . . would be required").

6. *The Failure Of The Government To Obtain Orders Of Approval For The Disclosure Of The Federal Bug And The State Wiretap Violated 18 U.S.C. §2517(5).*

Under 18 U.S.C. §2517(5) an "application" must be made for an order of approval to "disclose" a "wire or oral communication . . . relating to offenses other than those specified in the order of authorization . . . ." The bug order specified 18 U.S.C. §1962(c) and (d) and 21 U.S.C. §§ 841(a), 846. On February 9, 1982, Harvey was indicted on 21 U.S.C. §§ 848, 963, 952(a), 846 and 841(a)(1). No order of approval for the disclosure of the product of the Federal bug or the State wiretap was obtained to support the indictment returned under 21 U.S.C. §§ 848, 963, 952(a). In addition, an order of approval for the use of the State wiretap in the Federal trial was not obtained until the eve of trial, August 9, 1982. The District Court sought to avoid the impact of Section 2517(5) by holding that Section 848 was not an offense other than one specified in the Federal bug order and that it was, in any event, "impliedly" given by the granting of extensions. 560

F.Supp. at 1060-67.[16] The District Court rejected Harvey's objections to the State wiretap order of approval on the grounds of authorization, insufficiency, untimeliness, and lack of jurisdiction; it also held that a violation of Section 2517(5) did not warrant suppression. 560 F.Supp. at 1079-83. The Court of Appeals upheld the District Court, but it adopted only the implied approval theory. 789 F.2d at 1502-03. It also rejected Harvey's authorization, insufficiency, untimeliness, and lack of jurisdiction contentions in reference to the approval of the State wiretap without "extensive discussion." 789 F.2d at 1504-05. In particular, and without the benefit of a fact finding hearing and the submission of affidavits, it rejected Harvey's objection to the testimony before the grand jury of Darryl Falls, a witness identified in the State wiretap; it held that since his testimony came from personal knowledge, it was not the fruit of the wiretap. 789 F.2d at 1505.

The District Court and Court of Appeal's decisions flatly conflict with the text and legislative history of Section 2517(5). They are also inconsistent with *United States v. Brodson*, 528 F.2d 214, 216-17 (7th Cir. 1975) (surveillance under 18 U.S.C. §1955 (gambling business); approval required before trial under 18 U.S.C. §1084 (transmission of gambling information); *United States v. Marion*, 535 F.2d 697, 703-04 (2d Cir. 1976) (surveillance under State wiretap for State gun offense; approval required before trial under Federal gun offense); *State v. Mayes*, 284 Md. 625, 631-35, 399 A.2d 597,

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[16] It may be useful here to call things by their right names. When courts use terms like "implicit" or "implied," they may be making an inference of fact or they may be using them as a fiction of policy. *See* L. Fuller, *Legal Fictions* (1967). As an inference of fact, the process involved in their use is, of course, as unobjectionable as the inference is supportable. But when matters are "implied" in statutes, Bentham's sharp structures become relevant. For him, such fictions were "wilfull falsehood[s] having for . . . [their] object the stealing of legislative power, by and for hands which could not, or durst not, openly claim it . . . ." I.J. Bentham, *Works* at 2443 (J. Browning, ed. 1843). He added, "Fiction of use to justice? Exactly as swindling is to trade." VII, *id*. at 283.

603-07 (1979) (similar); *State v. Kuchinsky*, 3 Kan. App. 2d 225, 229, 592 P.2d 144, 148 (Ct. of App. 1979). Title III, in short, envisions close judicial supervision of post-surveillance use, as this Court has come to require of grand jury disclosure. *See, e.g., United States v. Sells Engineering*, 463 U.S. 418, 427-35 (1983). Nothing in Title III envisions "implied" or "automatic" approval. Moreover, the Court of Appeals decision on Falls' testimony is radically inconsistent with *Gelbard v. United States*, 408 U.S. 41 (1972) (suppression of derivative illegal surveillance before a grand jury); *Harrison v. United States*, 392 U.S. 219, 225 n.12 (1968) (Government, not defendant, must establish lack of taint); *Wade v. United States*, 388 U.S. 226, 240 (1967) (independent source must be shown by clear and convincing evidence); and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.9 (1981) (argument alone cannot carry burden).

Here, too, it is time, after full briefing on the merits of each of the issues concerning the order of approval system, for this Court to breathe life back into provisions that have become a dead-letter in practice. As more wiretapping and bugging occurs, involving more people for longer periods of time, a greater need exists for close judicial supervision, not only before and during, but after, the basic period of listening. *Cf. Personal Privacy in An Informational Society* at 501 (1974) ("there must be a way for an individual to prevent information about him obtained for one purpose from being used . . . for other purposes . . . .") Until this Court intervenes, these provisions of the 1968 Act will remain lifeless. So, too, must the integrity of any fact finding process be upheld. *See Goldsmith* at 143-44, 150 ("courts . . . [have] declined to enforce the provision strictly"; "present practice is so loose that the statutory language is actually being disregarded"; "[i]f the constitutional and statutory protections against improper expansion of surveillance are to regain their vitality, the judiciary must begin to enforce them in a more conscientious manner.")

7. *The Government Failed To Follow The Judicial Officer's Minimization Instructions That Were Required By 18 U.S.C. 2518(5).*

Under 18 U.S.C. §2518(5), an "order" for a bug must "contain" a "provision" that listening shall be conducted . . . [so as] to minimize the interception" of "communications" not "subject to interception." The bug application promised:

> Monitoring . . . will immediately be suspended when it is determined through voice identification [and] surveillance . . . that none of the principals are participants in the conversations . . . To further protect . . . privacy . . . no monitoring . . . will occur unless a vehicle known to be occupied or driven by one of the principals is observed in proximity to the premises.

Based on this promise, the judicial officer so ordered the Government to minimize. The record, however, indicates that none of the agents were able to identify any of the principals' voices at the time of listening. No radio calls or other indications were received indicating if the principals were present. The agents knew Harvey and the other subjects were out of town. Surveillance was not conducted to determine if others were on the premises. The progress reports indicated that they were not in fact present. Listening continued. The District Court held, however, that agents acted properly. 560 F.Supp. at 1075-76. Similarly, the Court of Appeals placed "little weight" on the conceded deviation from the promise of the application. 789 F.2d at 1501. It also found the absence of progress of no consequence and it suggested that no evidence of a specific conversation that should not have been listened to was "produced." *Id.* at 1502. It, therefore, upheld the District Court's decision. *Id.*

Neither the District Court nor the Court of Appeals legal characterization of the record can be supported. Both are wrong. Neither, too, is subject to the clearly erroneous standard. *Inwood Laboratories, Inc. v. Ives Laboratories,* 456 U.S. 488, n.15 (1982). Harvey's argument is uncomplicated: As an independent matter of minimization, while the principals, including Harvey, were not known to be present, monitoring should have ceased. *See Katz v. United States*, 389 U.S. 347, 354 (1967). When it was affirmatively learned they were out of town, the bug should have been terminated by the judicial officer. *See Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976) (judicial officials must take care to assure that search and seizures minimize unjustifiable intrusions). Had it been terminated when it should have been—after the filing of the fourth progress report on November 12, 1980, which indicated that the "subjects" were not "in town" and that information of when they would be back would not be available for "several weeks," no monitoring would have occurred after that date until the judicial officer authorized it, after he was told that the subjects had returned. As such, the conversations that in fact occurred on November 18 and 19, 1980, would not have been obtained. The failure to minimize, as promised in the application, led, in short, to the obtaining of information that was used to justify the extension. *See* 789 F.2d at 1502 ("boosted" by the intercept of November 18th and 19th). As such, they and the subsequent overhears were unlawfully obtained. *See Kremen v. United States*, 353 U.S. 346 (1957) (unrestrained seizure warrants total suppression); *United States v. Giordano*, 416 U.S. 505, 529-33 (1974) (illegal information automatically taints extension).

8. *The Conduct Of The Government In Listening Lacked A Showing Of Present Probable Cause, Necessity, And Particularity, Which Are Required By The Fourth Amendment.*

Harvey's contentions in this petition rest, not only on statutory, but also on constitutional grounds. The Fourth Amendment requires a showing of "present probable cause." *Berger v. New York*, 388 U.S. 41, 59 (1967). It requires a showing of "exigent circumstances" before a surreptitious invasion of privacy may be authorized. *Id.* at 60. Particularity —the basic notion behind the concept of minimization—is a mandate of the Constitution, not just Title III. *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976); *Katz v. United States*, 389 U.S. 347, 354 (1967). While this petition could be disposed of without reaching the constitutional questions, they are raised so as to cast in sharp relief the extent to which the District Court and the Court of Appeals have been unfaithful to the law. They have not merely transgressed their duty to uphold the 1968 Act; they have also failed to be faithful to the Constitution itself. If these provisions of the Fourth Amendment are to have life in this new era of extensive wiretapping and bugging in pursuit of the drug traffic, it will come about only through the active intervention of this Court to uphold constitutional values. Those in the front lines of this law enforcement war have tragically lost sight of their role of protecting civil liberties in times of great stress.

9. *The Failure Of The Government To Reveal To The Judicial Officer Issuing The Bug Order The Prior State Wiretap, The Trash Search, And Harvey's Absence Violated The Fourth Amendment.*

Here, too, what has been presented as a matter of the interpretation of Title III may also be recast in constitutional terms under *Franks v. Delaware*, 438 U.S. 154, 156 (1978). The key differences between the statutory arguments and the constitutional arguments must, however, be noted. *Franks* on its face only applies to false statements relating to probable cause. The requirement of Title III that applications be "full and complete" extends to omissions and showings of necessity. Little effort, however, is required to read *Franks* as applying to omissions. *See, e.g., United States v. Martin*, 615 F.2d 318, 327-29 (5th Cir. 1980). Similarly, it ought to be read to apply to necessity. *See, e.g., United States v. Ippolito*, 774 F.2d 1482, 1485 (9th Cir. 1985). Harvey has read Title III, however, as also setting a higher standard for wiretapping and bugging than *Franks* requires for general search and seizure warrants, as *Franks* requires, at a minimum, a showing of recklessness. Harvey reads Title III as applying to both advertently and inadvertently inaccurate applications, as Title III's requirements of "full and complete" is not qualified by state of mind language. As above, here, too, this Court's intervention is required if the teachings of *Franks*, apart from Title III, are to be given life in the area of extensive wiretapping and bugging.

10. *Title III, As Interpreted And Applied, Authorizes Unreasonable Searches And Seizures, Which Are Prohibited By The Fourth Amendment.*

This Court has never passed on the constitutionality of Title III. Harvey candidly acknowledges that the Courts of Appeal and the State Supreme Courts that have passed on it have uniformly upheld its facial constitutionality in reliance on this Court's opinions in *Katz v. United States*, 389 U.S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967). The cases are collected in *Carr* at 33. *Goldsmith*, at 55, however, rightly observes: "The real question today . . . is not Title III's facial validity, but the manner in which it has been applied." Harvey is prepared in a brief on the merits to argue that Title III has been so misinterpreted and misapplied generally, but in this case in particular, that it is, if not facially, at least as applied, no longer a statute authorizing only the reasonable search and seizure of the people. Senator John L. McClellan, the chief sponsor of Title III, observed in the 1968 debates:

> If we cannot trust the courts and our officials to enforce and obey the laws, then there is no redemption for America * * * We have to have courts, and we have to be able to rely on courts.

114 Cong. Rec. 12284 (1968). Sadly, little of what was done by the Government, the supervising judicial officer, the District Court, or the Court of Appeals in this litigation complied with a right-reading of applicable constitutional or statutory safeguards. Lamentably, this petition presents to this Court an unfortunately all too common example of a bug that was unnecessary, unjustified, heedlessly executed, and obtained by a process in which Government agents were in fact less than candid with the issuing judicial officer or the District Court; it is also a prosecution where the District Court and the Court of Appeals twisted both the record and the law to uphold the actions of the Government. This Court ought not let this opportunity pass to call to task those who enforce the law with the law itself. Mr. Justice Brandeis in his classic dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) rightly observed: "Our Government is the potent, the omni present teacher. For good or for ill, it teaches the whole people by its example." Lawless law enforcement will not only not rid our people of the drug traffic, it will leave us, not only cursed with drugs, but a lawless people. As Mr. Justice Frankfurter, a Justice, not a sentimentalist about crime or criminals, observed in *On Lee v. United States*, 343 U.S. 747, 758-62 (1952):

> Loose talk about war against crime too easily infuses the Administration of Justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process * * * Few sociological generalizations are more valid than that lawlessness begets lawlessness. * * * Such encouragement to lazy immoral conduct by the police does not bode well for effective law enforcement. Nor will crime be checked by such means.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to the Court of Appeals for the Eleventh Circuit.

Dated: August 27, 1986

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that each party required to be served has been served and specifically that I caused three (3) true and correct copies of the Petition for Writ of Certiorari and three copies of the Appendix to the Petition for Writ of Certiorari to be placed in a container addressed to the Solicitor General of the United States, Department of Justice, 10th & Constitution Avenue, N.W., Washington, D.C, 20530, with sufficient United States Post Office first class postage prepaid and caused said container to be deposited in a United States mailbox in Miami, Florida 33137, on this 27th day of August, 1986.

JAMES J. HOGAN

86-316 (2)

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM JOSEPH HARVEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

August 27, 1986

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189 pp

UNITED STATES of America,
Plaintiff-Appellee,

v.

Marion VAN HORN, Scott Bertelsen, Gary Balough, Dennis Kay, Robert Van Horn, Dennis Cason, Thomas Sikes, John Crosby Bertelsen, Joseph William Campbell,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

William Joseph HARVEY, a/k/a Billy,
Defendant-Appellant.

Nos. 83-5102, 84-5138.

United States Court of Appeals,
Eleventh Circuit.

May 23, 1986.

Defendants were convicted in the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., 560 F.Supp. 1040, of various charges stemming from marijuana importation and distribution ring, and they appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) affidavit in support of electronic surveillance order was sufficient under Title III; (2) omission of page from affidavit showing that Government intended to disclose prior state wiretap did not mandate suppression of subsequently intercepted communications; (3) severance of trials from that of another defendant was not required on basis of compelling prejudice; (4) defendants were not entitled to disclosure of type of microphone and location of microphone from which electronic surveillance was made: and (5) evidence supported convictions of conspiracy to make false statements.

Affirmed.

See also, 544 F.Supp. 189.

1. Telecommunications —516

To meet necessity requirement for electronic surveillance under Title III, affidavit need not show a comprehensive exhaustion of all possible investigative techniques, but must simply explain retroactive or prospective failure of several techniques that reasonably suggest themselves. 18 U.S.C.A. §2518(1)(c).

2. Telecommunications —516

Affidavit met necessity requirement for electronic surveillance under Title III of office of defendant suspected of masterminding marijuana importation and distribution ring, as affidavit set forth numerous facts showing that ordinary surveillance techniques had been attempted and had failed. 18 U.S.C.A. §2518(1)(c).

3. Telecommunications —519

Under Title III, district court is not required to terminate a surveillance whenever it receives a report of no progress. 18 U.S.C.A. §§ 2510-2520, 2518(1)(c).

4. Telecommunications —527

Progress reports district court requested in authorizing electronic surveillance were not required by Title III, but were ordered at discretion of district judge; thus, import of progress reports was also a matter within discretion of district court. 18 U.S.C.A. §2518(6).

5. Telecommunications —515

District court was within its discretion in determining that information in affidavit justified 30 days of electronic surveillance of office of defendant suspected of masterminding marijuana importation and distribution ring, as it set forth continuing criminal enterprise, operating over long period of time; thus, affidavit set out probable cause as required under Title III. 18 U.S.C.A. §2518(1)(b)(i).

6. Telecommunications —515

Defendant's temporary absence did not negate probable cause showing required for electronic surveillance, under Title III, of defendant's office on suspicion of masterminding marijuana importation and distribution ring, as FBI stated in its progress reports that it believed defendant would return shortly, and affidavit set forth three other employees of defendant's business as possible conspirators who could have been overheard in office even during defendant's absence. 18 U.S.C.A. §2518(1)(b)(i).

7. **Telecommunications —530**

District court was not clearly erroneous in finding that FBI did not know that defendant was a named target of state Title III wiretap authorization, thereby supporting conclusion that had such information been disclosed in federal electronic surveillance application, it would have met requirement of Title III that previous applications for surveillance be disclosed. 18 U.S.C.A. §2518(1)(e).

8. **Criminal Law —394.3**

Suppression is not mandated by inadvertent noncompliance with Title III requirement that prior applications for electronic surveillance be disclosed. 18 U.S.C.A. §2518(1)(e).

9. **Criminal Law —394.5(4)**

Party seeking suppression on basis that affidavit in support of search warrant omitted something bears burden of showing omission was more than negligent.

10. **Telecommunications —514**

Omission, from affidavit in support of electronic surveillance under Title III, of information of state wiretap on phone of an individual who was alleged participant in defendant's drug ring, did not require district court to infer recklessness so as to render affidavit insufficient under Title III's disclosure section, as that information, contained on missing page of affidavit, was referred to in subsequent progress reports, and there was no evidence that government agents failed to proofread or otherwise properly examine the affidavit. 18 U.S.C.A. §§ 2510-2520, 2518(1)(e).

11. Telecommunications —520

Agents complied with requirement for electronic surveillance under Title III that the surveillance be properly minimized, as logs and testimony supported conclusion that agents ceased monitoring conversations they determined to be nonpertinent to alleged drug ring, and defendants produced no evidence of specific conversations which agents should not have monitored. 18 U.S.C.A. §§ 2510-2520, 2518(5).

12. Telecommunications —514

That district judge who authorized initial electronic surveillance under Title III was outside district when he executed order extending wiretap did not invalidate the extension. 18 U.S.C.A. §§ 2510-2520, 2518(3).

13. Telecommunications —514

Florida law authorizes surveillance for marijuana offenses, and thus government's application for extension of electronic surveillance order under Title III was not tainted by referring to state wiretap. 18 U.S.C.A. §§ 2510-2520, 2516(2); West's F.S.A. §934.07.

14. Telecommunications —520

Continuing approval of district court which authorized electronic surveillance under Title III met requirement of statute's judicial approval limitation, which prevents incidental interception of conversations for which government has shown no probable cause, as authorizing judge received both progress reports and applications for extension, they described nature of conversations being intercepted, and authorizing judge twice extended the surveillance after reviewing conversations and determining that they were properly intercepted. 18 U.S.C.A. §§ 2510-2520, 2517(5).

15. Criminal Law —394.3

No special approval is required before submission, to state courts, of application to use state evidence under section of Title III providing for judicial approval for use of evidence obtained through a state wiretap. 18 U.S.C.A. §§ 2510-2520, 2517(5).

16. Criminal Law —394.3

State judge, in authorizing federal agents to use evidence obtained through state wiretap, complied with section of Title III requiring judicial approval, as state judge expressly found that interceptions related to federal charges were "intercepted incidentally," and, as same judge who had authorized state wiretap, was in a position to know whether state agents had properly executed state wiretap. 18 U.S.C.A. §§ 2510-2520, 2517(5).

17. Criminal Law —394.3

Delay of five months by federal agents in requesting state judge to authorize their use of evidence obtained through state wiretap was timely under Title III action. 18 U.S.C.A. §2517(5).

18. Criminal Law —394.3

Use of testimony of witness implicated in state evidence used to obtain federal indictment against defendant did not violate Title III section requiring judicial approval of use of state wiretap evidence, as his testimony came from personal knowledge rather than from a surveillance. 18 U.S.C.A. §§ 2510-2520, 2517(3), (5).

19. Criminal Law —394.3

State circuit judge was authorized, under Florida law and thus under Title III, to approve federal agents' use of state wiretap evidence. 18 U.S.C.A. §§ 2510-2520, 2510(9)(b), 2517(5); West's F.S.A. §934.02(8).

20. Criminal Law —622.2(6)

Antagonistic defenses may satisfy compelling prejudice standard for severance, but only if defenses are irreconcilable and mutually exclusive.

21. Criminal Law —622.2(6)

First defendant's defense did not result in compelling prejudice to remaining defendants so as to justify severance of their trials in prosecution for various charges stemming from marijuana importation and distribution ring, notwithstanding that first defendant's counsel did admit that his client was likely guilty of some crime, as focus of her arguments was that individual which masterminded alleged ring was primary culprit, the alleged mastermind did not go to trial, and neither first defendant nor remaining defendants introduced evidence at trial.

22. **Indictment and Information —124(1)**

Indictment showed common goal of systematic and repeated importation and distribution of large amounts of marijuana, and overlapping participation by various defendants; therefore, there was no misjoinder of defendant in counts alleging conspiracy to import marijuana and a count alleging conspiracy to possess marijuana with intent to distribute; those counts set forth a single conspiracy in which defendant was a member.

23. **Criminal Law —627.5(6)**

There is a qualified government privilege not to disclose sensitive investigative techniques.

24. **Telecommunications —528**

Government's qualified privilege not to disclose sensitive investigation techniques applies equally to nature and location of electronic surveillance equipment.

25. Criminal Law —627.6(1)

Defendants, charged with participation in marijuana importation and distribution ring, failed to show necessity of disclosure by government of type of microphone used in electronic surveillance, and where microphone was hidden.

26. Criminal Law —627.8(2)

That government delayed until eighth week of trial to request that defendants provide voice exemplars did not prejudice defendants, and thus did not render the request untimely.

27. Criminal Law —394.4(9), 412.1(3)

Evidence seized during an unlawful arrest, or statements made by person unlawfully arrested while in custody, are products of arrest and will be suppressed; evidence with only a loose causal connection to an illegal arrest, however, will not be suppressed.

28. Criminal Law —394.3

Conversations of defendant's coconspirators regarding his arrest were not the product of that illegal arrest, and thus wiretap evidence of the conversations about the arrest was admissable, as causal connection between arrest and statements was broken by intervening acts of third parties.

29. Criminal Law —40

By using evidence of defendant's prior arrest for state marijuana charges, Government did not violate agreement in which Government agreed not to pursue any criminal or civil liability arising out of event in return for defendant's agreement to forfeit a vessel to the United States, as Government did not agree to never use the arrest as evidence in a prosecution for subsequent criminal activity.

30. Conspiracy —47(6)

Evidence supported finding that defendants agreed to make false statements to the FBI relevant to their alleged participation in drug importation ring, thereby supporting their convictions of conspiracy to make false statements. 18 U.S.C.A. §1001.

31. Fraud —68.10(1)

A statement is material, for purposes of offense of making false statement, if it has a natural tendency to influence, or to be capable of affecting or influencing a governmental function; statement need not have exerted actual influence, so long as it had capacity to do so. 18 U.S.C.A. §1001.

32. Fraud —68.10(4)

Statements made to FBI by coconspirator of main target of FBI investigation into drug importation ring were material for purposes of offense of making false statements, as record indicated that FBI was interested in using third party to obtain information about their main target, and misstatements defendant agreed to make would have misled FBI about main target's relationship with third party. 18 U.S.C.A. §1001.

33. Fraud —68.10(1)

"Exculpatory no" exception to offense of making false statement does not apply when a person attempts to affirmatively mislead a government investigation.

34. Fraud —68.10(1)

"Exculpatory no" exception to offense of making false statements did not apply to defendant's statements to FBI about main target of FBI investigation into drug importation, as defendant did not simply agree to deny personal wrongdoing, but to mislead the FBI about their main target. 18 U.S.C.A. §1001.

Richard Harris, Neil Karadbil, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee in 83-5102.

Paul D. Lazarus, Nurik, O'Donnell & Lazarus, Lauderdale, Fla., for Scott Bertelsen.

Paul M. Rashkind, Miami, Fla., for Thomas Sikes, J.C. Bertelsen.

Ronald A. Dion, Entin, Schwartz, Dion & Sclafani, North Miami Beach, Fla., for M. Van Horn, R. Van Horn, Dennis Kay, Dennis Cason, Gary Balough, Scott Bertelsen & Joseph William Campbell.

James J. Hogan, Miami, Fla., George Robert Blakey, Notre Dame Law School, Notre Dame, Ind., for defendants-appellants.

Neil Karadbil, Ft. Lauderdale, Fla., Jon May, Linda Collins Hertz, Richard Kamp, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee in 84-5138.

Appeals from the United States District Court for the Southern District of Florida.

Before FAY and KRAVITCH, Circuit Judges, and HENLEY*, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

Ten different defendants challenge their convictions under various charges stemming from a marijuana importation and distribution ring.[1] The ring, masterminded by appellant William Joseph Harvey, operated between 1978 and 1982. Harvey ran the operation from his office at the Delray Towing Service, a business he owned in Delray Beach, Florida. The organization used speedboats to transport marijuana from large freighters into the United States, and then distributed the marijuana.

There is no contention that the evidence was not sufficient to show the participation of all of the appellants in the conspiracy. The prosecution, however, relied on evidence obtained by electronic surveillance of Harvey's office at Delray Towing. All of the appellants challenge the legality of the surveillance and contend that the evidence should not have been admitted. The district court conducted an evidentiary hearing and, after long and careful consideration, denied the appellants' motion to suppress the evidence. *United States v. Harvey*, 560 F.Supp. 1040 (S.D.Fla.1982). The propriety of this decision is the main focus of this appeal.

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* Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

[1] Appellant Harvey entered a conditional plea of guilty, reserving his right to appeal the district court's ruling on the motion to suppress. Fed.R.Crim.P. 11(a)(2). The remaining appellants went to trial and were convicted by a jury.

I. ADMISSIBILITY OF THE ORAL INTERCEPT EVIDENCE

Background

On October 17, 1980, the government applied to the district court for an order authorizing interception of oral communications in Harvey's office at Delray Towing. The application was supported by an affidavit of Stephen Gillman, an Assistant United States Attorney, and Harold C. Copus, an agent of the Federal Bureau of Investigation (FBI). On October 20, the district court entered an order authorizing interception for thirty days; the district court entered orders extending the interception period on November 20 and again on December 19. The listening device functioned from October 24, 1980 until January 19, 1981.

The district court's authority to authorize the electronic surveillance involved in this case is found in Title III of The Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. §§ 2510-2520. Title III sets forth numerous requirements the government must meet before surveillance may be authorized, 18 U.S.C. §2518(1), the findings the district court must make, 18 U.S.C. §2518(3), and requirements for the district court's authorization order. 18 U.S.C. §2518(4). Title III contains its own exclusionary rule under which the appellants all have standing to challenge the surveillance. 18 U.S.C. §2518(10). The appellants raise numerous potential deficiencies in the district court's authorization.

A. Necessity of Electronic Surveillance Under 18 U.S.C. §2518(1)(c).

An application for interception must contain

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or be too dangerous.

18 U.S.C. §2518(1)(c). Appellants contend that the two affidavits supporting the government's October 17, 1980, application are little more than "boilerplate." They argue that alternative investigative techniques were available, namely, ordinary surveillance, execution of a search warrant of Delray Towing, an undercover "sting" operation, and a grand jury investigation with immunity for witnesses.

[1, 2] The necessity requirement is designed to ensure that electronic surveillance is neither routinely employed nor used when less intrusive techniques will succeed. *United States v. Giordano*, 416 U.S. 505, 515, 94 S.Ct. 1820, 1826, 40 L.Ed.2d 341 (1974); *United States*

v. Kahn, 415 U.S. 143, 153 n. 12, 94 S.Ct. 977, 983 n. 12, 39 L.Ed.2d 225 (1974). The affidavit need not, however, show a comprehensive exhaustion of all possible techniques, but must simply explain the retroactive or prospective failure of several investigative techniques that reasonably suggest themselves. *United States v. Alonso*, 740 F.2d 862, 868 (11th Cir.1984), *cert. denied*, ____ U.S. ____ 105 S.Ct. 928, 83 L.Ed.2d 939 (1985); *United States v. Hyde*, 574 F.2d 856, 867 (5th Cir.1978). Judged by these standards, we believe the affidavit in this case was sufficient.

With respect to the utility of ordinary surveillance techniques, Agent Copus' affidavit sets forth numerous facts showing that they had been attempted and had failed. The affidavit also explains the failures. The affidavit states that surveillance of actual marijuana off-load operations was impossible because of anti-surveillance techniques employed by Harvey. These techniques included use of a helicopter, night scopes and listening devices, and central command of the various small vessels from a larger vessel. In addition, it is obvious that the government was not seeking to catch one or two small vessels with marijuana, but to expose the entire conspiracy. The affidavit also sets forth the reasons why surveillance of the headquarters at Delray Towing was impossible. According to the affidavit, to the west of Delray Towing was the city dump; to the east a parking lot for a night club that was frequented by members of the ring and owned by Harvey's father, to the north a garage, to which agents could not obtain access without disclosing the investigation; to the south, the nearest point from which surveillance could be conducted was a half mile away. Harvey also conducted security procedures at

Delray Towing; indeed, one attempt at surveillance from a building approximately one-half to one mile away was discovered by Harvey. Finally, the affidavit states that even if ordinary surveillance were practical, it could only lead to evidence that members of the conspiracy were meeting, and not to direct evidence of criminal activity.

The affidavit explained that a search of the premises at Delray had been considered and rejected because it was not believed that there was sufficient physical evidence there to reveal the entire conspiracy or to successfully prosecute its members.

With respect to a "sting" operation, the affidavit indicates that the informants upon which the government was relying feared for their lives because of threats from Harvey. The affidavit also states that government agents had tried and failed to gain introduction to Harvey. The affidavit asserts that such attempts would endanger the lives of undercover agents and informants. Appellants contend that the affidavit is incredible in this respect because the FBI had informants with knowledge of the conspiracy. The contention is frivolous; that the informants may have known of the conspiracy does not mean Harvey would have trusted them. Moreover, the affidavit explained that these persons feared for their lives.

Agent Copus' affidavit further states that he had discussed the possibility of a grand jury investigation with the Assistant United States Attorney. The affidavit explains that such an investigation was rejected because the necessary witnesses were members of the conspiracy and would not voluntarily testify, and that it had been impossible to determine the roles of various members of the conspiracy in order to judge who should be afforded immunity.

With respect to the danger to informants posed by either a sting operation or a grand jury investigation, we note that the affidavit asserts that one informant directly refused to testify out of fear, another source relayed death threats that Harvey had made against potential informants, another witness had been beaten and received death threats, one member of the conspiracy was left at a hospital with bullet wounds which he refused to explain and another person was threatened with death. The affidavit therefore presents a pattern of threats and a presence of danger to witnesses and agents. This existence of danger is one of the justifications for electronic surveillance. 18 U.S.C. §2518(1)(c). The appellants argue that the fears alleged in the affidavit are belied by the fact that witnesses testified at trial. Again, this contention is frivolous; that witnesses were willing to testify in court after the FBI had broken the conspiracy and arrested its members does not indicate that they would have been willing to do so at the time the surveillance was requested.

Appellants' final contention with respect to necessity is that the district court improperly relied on Agent Copus as an expert witness. This contention is difficult to understand. The district court's authorization order does not state that its decision was based on any expert opinion of Agent Copus, and as discussed above, the affidavit set forth numerous factual matters rather than expert opinion. The appellants cite no authority that an application for oral interception *must* be based on an expert opinion. In any event, the affidavit indicates that Agent Copus had five years experience as an FBI agent, with two years of speciiization in narcotics; the district court clearly would have been within its discretion had it chosen to rely on Copus as an expert.

B. Probable Cause under 18 U.S.C. §2518(1)(b).

> An application must include
> a full and complete statement of the facts and circumstances . . . including (i) details as to the particular offense that has been, is being, or is about to be committed.

18 U.S.C. §2518(1)(b)(i). The offense set forth in the application was a RICO conspiracy. 18 U.S.C. §§ 1961-68. The affidavit lists an organization with a leader, various lieutenants, and workers. The organization was headquartered at Delray Towing, and had a continuing business of importing and distributing marijuana. The appellants' contentions that the affidavit did not establish probable cause that there had been an agreement to commit two predicate RICO acts, 18 U.S.C. §1961(5), and that the affidavit did not set forth probable cause that there was a RICO enterprise 18 U.S.C. §1961(4), require no further discussion in light of the facts already discussed. *See United States v. Bascaro*, 742 F.2d 1335, 1342-43 (11th Cir. 1984) (marijuana offenses may be predicate acts for RICO charge), *cert. denied*, ____ U.S. ____, 105 S.Ct. 3476, 3477, 3488, 87 L.Ed.2d 613 (1985); *United States v. Pepe*, 747 F.2d 632, 659-60 (11th Cir.1984) (RICO conspiracy requires that defendant agree to commit the two predicate acts and be aware that others have

done so); *United States v. Hewes*, 729 F.2d 1302, 1310-11 (11th Cir.1984) (definition of RICO enterprise), *cert. denied*, ____ U.S. ____, 105 S.Ct. 790, 83 L.Ed.2d 783 (1985). In addition, the affidavit demonstrated an ongoing enterprise operated out of Harvey's office; thus there was probable cause to believe that the surveillance would yield incriminating evidence.[2]

The appellants urge that even if probable cause existed at the time of the application, the district court should have terminated the surveillance when no incriminating conversations were intercepted during the first days of the wiretap. The appellants argue that the district court should have shut down the surveillance upon receipt of the reports indicating no progress in the investigation. They cite two reasons why probable cause no longer existed: at the time of the November 12, 1980, progress report, no relevant conversations had been obtained and the latest information on Harvey was sixty-six days old; and after the surveillance began the agents learned that Harvey was out of town.

[3-5] In our view a district court is not required to terminate a surveillance whenever it receives a report of no progress. First, the progress reports the district court required in this case were not mandated by the statute, but were ordered at the discretion of the district judge. 18 U.S.C. §2518(6). Accordingly, the import of the progress reports was also a matter within the discretion

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[2] The appellants contend that the FBI was not authorized to conduct surveillance in connection with narcotics offenses. Our conclusion that the affidavit set forth probable cause of a RICO violation, which the appellants admit the FBI was authorized to investigate, obviates consideration of this issue.

of the authorizing district court. *See United States v. Iannelli*, 477 F.2d 999, 1002 (3d Cir.1973), *aff'd on other grounds*, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). In authorizing the thirty days of surveillance, the district court determined that there was probable cause to believe relevant communications would be intercepted within the thirty day period. 18 U.S.C. §2518(3)(b). The proper time to consider whether the information in the affidavit had become stale would be at the end of the thirty days when the government reapplied. 18 U.S.C. §2518(1)(f). The district court was clearly within its discretion in determining that the information in the affidavit justified thirty days of surveillance. The affidavit set forth a continuing criminal enterprise, operating over a long period of time. *See Scott v. United States*, 436 U.S. 128, 140-42, 98 S.Ct. 1717, 1724-26, 56 L.Ed.2d 168 (1978) (investigations of large, complex conspiracies justify a greater scope of surveillance); *United States v. Bascaro*, 742 F.2d 1335, 1345-46 (11th Cir.1984) (staleness of evidence considered liberally in cases involving large drug conspiracies due to their protracted and continuous nature), *cert. denied*, ____ U.S. ____, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985). Accordingly, the fact that the most recent information would have been two months old at the end of the period does not indicate that probable cause did not exist.

[6] Furthermore, Harvey's temporary absence, reported to the district court, did not negate the probable cause. First, the FBI stated in its progress reports that

it believed Harvey would return shortly.[3] Second, the affidavit set forth three other employees of Delray Towing as possible conspirators, and these persons could have been overheard in the office even during Harvey's absence.[4]

C. Showing of Previous Applications for Electronic Surveillance Under 18 U.S.C. §2518(1)(e).

The application for electronic surveillance must include

> a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each such application.

18 U.S.C. §2518(1)(e). Prior to the federal surveillance, the Boca Raton, Florida Police Department had obtained

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[3] The October 29, 1980, progress report stated that Harvey was expected back that day. The November 4, 1980, progress report stated that the principals were "maintaining a low profile" due to arrests by state officials, but were expected back shortly. Accordingly, there is no factual basis in the record for appellants' contention that current probable cause did not exist.

[4] Appellants contend this is contrary to the record because the record indicates all meetings were called by Harvey. We disagree. The affidavit indicated other employees of Delray were involved in the conspiracy. It is reasonable to infer they might converse in Harvey's office even in Harvey's absence.

authorization for a state Title III wiretap on the phone of Robert Jernigan, one of the members of the drug ring. The federal agents learned of the state wiretap on October 14, 1980. Harvey was one of the named targets of the state wiretap. The state wiretap was not disclosed in the October 17, 1980 application for surveillance. In considering the motion to suppress, the district court found that the government had intended to disclose the wiretap, but that a page of the application, (page 21C) had been inadvertently omitted. 560 F.Supp. at 1070. The district court also found that the FBI agents did not know at the time that Harvey was a target of the state investigation.

[7] The appellants argue that, even including page 21C, the application did not contain "a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application." They argue that the agents knew that Harvey was a named target of the state Title III. The district court, after a hearing on the motion to suppress, found otherwise, 560 F.Supp. at 1073, and appellants must show these findings to be clearly erroneous. Appellants focus on testimony of government agents that they knew about the state wiretap, and that they knew that Harvey had been intercepted. That Harvey might have been intercepted is an obvious inference from the existence of the wiretap, as the application set forth a believed criminal relationship between Harvey and Jernigan. The agents, however, clearly testified that they did not know Harvey had been named on the state application, and the district court chose to believe this testimony. The agents further testified that they did not learn whether Harvey had actually been

intercepted. The district court also relied on testimony that the FBI agents did not attempt to learn the details of the state investigation because they feared tainting their own evidence if the state investigators had committed any illegalities, found the state investigators uncooperative, and thought the state investigators were after Jernigan rather than Harvey. We hold that the district court's finding that the FBI did not known that Harvey was a named target of the state Title III is not clearly erroneous. Accordingly, had page 21C been included, the application would have met the disclosure requirement.[5]

[8] We must consider, therefore, what standard applies to an inadvertent omission of material required by section 2518(1)(e). Title III's exclusionary rule applies to communications that have been "unlawfully intercepted." 18 U.S.C. §2518(10)(a). The Supreme Court has ruled that not all failures to satisfy the statutory requirements of Title III render an interception "unlawful." *United States v. Donovan*, 429 U.S. 413, 438, 97 S.Ct. 658, 673, 50 L.Ed.2d 652 (1977). In *Donovan*, the Court held that a violation of the requirement that the application identify all those likely to be overheard, 18 U.S.C. §2518(1)(b)(iv), did not mandate suppression because the requirement did not play a central role in the decision to authorize surveillance. The Supreme Court found a difference between those requirements of the application that pertain to the determination the district judge must make to authorize the surveillance (section 2518(3)(a-d)) and the remaining requirements for the application.

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[5] Because the agents did not "know" Harvey was named on the state Title III application, we need not consider whether a failure to completely satisfy the requirements of section 2518(1)(e) would mandate suppression.

The determinations the authorizing judge must make relate to the probable cause and necessity requirements. The disclosure of prior wiretaps does not relate to the legal determination the judge must make. Accordingly, inadvertent noncompliance with the section 2518(1)(e) disclosure requirement does not mandate suppression. Our conclusion is consistent with the only other circuit we know to have considered the question since the Supreme Court's decision in *Donovan. See United States v. Abramson*, 553 F.2d 1164, 1169-70 (8th Cir.), *cert. denied*, 433 U.S. 911, 97 S.Ct. 2979, 53 L.Ed.2d 1095 (1977).[6]

[9, 10] The appellants also claim that the omission of page 21C was a constitutional violation, requiring

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[6] Appellants contend the *Abramson* is in conflict with *United States v. Bellosi*, 501 F.2d 833 (D.C.Cir.1974). *Bellosi*, however, was decided before the Supreme Court's decision in *Donovan*, and we find it unpersuasive.

Appellants contend that the omission of page 21C also relates to the section 2518(1)(c) necessity showing. They argue that section 2518(1)(c) requires a "full and complete statement" of prior investigative efforts, and that therefore *any* omission of a prior investigative effort requires suppression. We disagree. Such a reading of section 2518(1)(c) would render section 2518(1)(e) superfluous; section 2518(1)(e) requires that the application disclose all prior electronic surveillance "known" to the officer. Hence, appellant's "strict liability" interpretation of section 2518(1)(c) is contrary to the statutory language. We therefore analyze the omission of page 21C in the context of section 2518(1)(e). In any event, the existence of the prior state wiretap, which did not yield evidence to arrest Harvey, made the surveillance neither more nor less necessary. *See United States v. Donovan*, 429 U.S. 413, 438, 97 S.Ct. 658, 673, 50 L.Ed.2d 652 (1977) (suppression of electronic surveillance required only if interception was "unlawful").

dismissal under *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684-85, 57 L.Ed.2d 667 (1978). *Franks* only applies, however, to intentional or reckless omissions from an affidavit. *Id.* Affidavits supporting warrants are presumed valid, and the party seeking suppression bears the burden of showing the omission was more than negligent. *Id.* at 171, 98 S.Ct. at 2684; *United States v. Martin*, 615 F.2d 318, 327-29 (5th Cir.1980). The district court found that the omission was inadvertent. The appellants contend that this finding is clearly erroneous, arguing that the omission itself raises an inference of recklessness, and that the government must then prove that the omission was not reckless. We disagree. There may be cases in which the district court may infer recklessness from an omission, but we do not believe it was required to do so in this case. *See Franks*, 438 U.S. at 171, 98 S.Ct. at 2684 (party seeking suppression must prove omission was more than negligence), *Martin*, 615 F.2d at 329. The record demonstrated that the government had intended to include page 21C, as the material was referred to in subsequent progress reports. A government agent filing an affidavit has a duty to ensure that the affidavit has been carefully assembled, but that does not mean that if a page slips out the agent has been reckless. Here, there is not even any evidence that the government agents failed to proofread or otherwise properly examine the affidavit. We hold that the findings of the district court are not clearly erroneous. Accordingly, because the omission was not shown to be reckless, we need not address the implications of *Franks* for Title III cases.

D. Whether the Surveillance Was Properly Minimized as Required by 18 U.S.C. §2518(5).

Every authorizing order must require that the surveillance "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. §2518(5). The authorizing order at issue contained such a requirement. The district court found that the monitoring agents had made a good faith effort to minimize, and that they had in fact reasonably minimized interception. 560 F.Supp. at 1075-76.

The appellants contend that the agents did not minimize. They do not rely on evidence that nonpertinent conversations were monitored; rather they rely upon the practices the agents used and the supervision of the district court. They note that the agents violated their own guidelines for minimization. The practices appellants criticize are as follows. The application stated that the agents would minimize by suspending monitoring whenever voice identification indicated that the conversants were not the principals, and that agents would coordinate their monitoring with surveillance of Delray Towing to ensure that some of the principals were inside when monitoring was done. The agents found voice identification difficult during the early stages of the monitoring, and did not coordinate their monitoring with normal surveillance. The Assistant United States Attorney instructed the agents to tape record all monitored conversations, but in fact the agents only recorded conversations they believed incriminating. They also monitored during times they knew Harvey was out of town.

The Supreme Court discussed the principles for reviewing claims that agents failed to minimize Title III surveillance in *Scott v. United States*, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). The Court first made clear that the motives, or good faith, of the monitoring agents was simply not an important consideration. 436 U.S. at 138-39, 98 S.Ct. at 1723-24. Rather, the question is whether the agents' monitoring was reasonable in light of all the facts and circumstances of the case. The Court cited several factors in *Scott*, including the number of nonpertinent conversations intercepted, the location of the surveillance, and the nature of the investigation. *Id.* at 139-40, 98 S.Ct. at 1724-25.

In the current case, therefore, we place little weight on the fact that the agents deviated somewhat from the conditions in the application. Although the practices employed by the agents are a consideration, we are more concerned with whether the agents in fact monitored nonpertinent conversations. In any event, the practices employed were reasonable. With regard to the voice identification issue, we note that in the early stages the agents were dealing with what they believed to be a large conspiracy with many of the members still unidentified. Accordingly, they could hardly use voice identification alone to guide their monitoring. *See Scott*, 436 U.S. at 141, 98 S.Ct. at 1725 (voice identification may be impossible during initial stages of a conspiracy investigation). Indeed, one of the goals of the surveillance was to identify additional conspirators. As far as coordination with normal surveillance, we have already discussed difficulties of such surveillance in this case. We have also already discussed the effect of Harvey's absence; there were other members of the conspiracy who may have been overheard in the office, and the agents expected Harvey to return. *Scott*, 463 U.S. at

140-41, 98 S.Ct. at 1724-25 (when bug is located in place frequented by conspirators rather than public, wider monitoring is justifiable).

The appellants also urge that the authorizing district judge's failure to terminate the surveillance upon receipt of reports of no progress indicates the surveillance was not minimized. Again appellants miss the mark. The progress reports reveal no pertinent conversations, but do not show that the agents were unduly monitoring nonpertinent conversations.

[11] We turn to the key issue, whether in fact the agents unreasonably monitored nonpertinent conversations. The district court found, on the basis of the agents' testimony and their monitoring logs, that the agents ceased monitoring conversations they determined to be nonpertinent. The logs and testimony do in fact support the district court's conclusion. Most important, the appellants have produced no evidence of specific conversations which the agents should not have monitored. Because the appellants cite no evidence contradictory to the district court's findings of fact, we must accept them as not clearly erroneous. We therefore hold the agents complied with the minimization requirements.

E. Validity of the November 20 order Extending the Authorization for Another 30 Days.

Appellants claim that the extension of surveillance was without probable cause, again focusing on whether the elements of a RICO conspiracy were shown. The contentions have been adequately discussed above. We note, however, that the probable cause was boosted by the interception of pertinent conversations on November 18 and 19, tending to confirm the existence of the conspiracy.

[12] Appellants also challenge the extension on the ground that the authorizing judge was outside the district when he executed the order. The authorizing judge, a judge of the Southern District of Florida, was in the Middle District of Florida at the time. As a judge of the Southern District, the judge had the power to authorize surveillance conducted within that district. 18 U.S.C. §2518(3). Appellants cite no authority for their contention that district courts may not authorize surveillance conducted within their territorial jurisdiction if the judge happens to be physically outside the jurisdiction. Nor is there any reason to deny district judges such power. Indeed, such authority has traditionally been recognized. *See e.g., United States v. Strother,* 578 F.2d 397 (D.C.Cir.1978).

Appellants also urge that the government's application for the November 20 extension was tainted because it referred to the state wiretap, arguing that the state wiretap was invalid because Florida law does not permit wiretapping for investigation of marijuana offenses.

[13] Florida law authorizes surveillance for marijuana offenses; hence we reject appellants' contention that the state wiretap was invalid. Appellants' argument is based on a difference between the language of the state and federal wiretapping statutes. The federal statute authorizes investigations of "dealing in narcotic

drugs, marijuana or other dangerous drugs." 18 U.S.C. §2516(2). The state law, however, refers only to "narcotics or other dangerous drugs." Fla.Stat.Ann. §934.07. According to appellants the state omitted "marijuana" in order to exclude marijuana offenses from electronic surveillance. Appellants cite nothing in either the legislative history or Florida decisions to support this contention. In fact the state likely omitted "marijuana" because it believed it redundant in light of the inclusion of "dangerous drugs." The Florida courts have not directly addressed the issue, but they have referred to marijuana as a dangerous drug, and have affirmed convictions for marijuana offenses on the basis of wiretap evidence. *See e.g., State v. Manning*, 379 So.2d 1307 (Fla.Dist.Ct.App.1980) (affirming use of electronic surveillance evidence in marijuana case); *Hamilton v. State*, 366 So.2d 8 (Fla.1978) (marijuana a dangerous drug). Accordingly, we hold that the state electronic surveillance law includes marijuana offenses and the state wiretap therefore was valid.

F. Compliance with Disclosure Requirement of 18 U.S.C. §2517(5) with respect to the Federal Surveillance

The application and authorization orders for the surveillance in this case designated, among others, the following sections: 21 U.S.C. §§ 841(a), 846, and 18 U.S.C. §1962(c-d). Appellant Harvey was indicted under 21 U.S.C §848, 952(a) & 963. Harvey contends that the variance between the application and the indictment invoked the requirement of section 2517(5) that the government obtain prior approval before disclosing the evidence. Section 2517(5) provides:

> When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Harvey urges that the charges in the indictment were for "offenses other than those specified in the order of authorization or approval," and that the government revealed evidence to the grand jury without obtaining judicial approval.

The government responds that (1) the application set forth probable cause of the existence of the violations charged in the indictment and that the mere failure to include statutory citations does not mean that the offenses were "other than those specified," and (2) that the use of the evidence was in effect approved by the authorizing court, which viewed progress reports and extended the surveillance.

Congress adopted section 2517(5) because it "wished to assure that the Government does not secure a wiretap authorization order to investigate one offense as a subterfuge to acquire evidence of a different offense for which the prerequisites to an authorization order are lacking." *United States v. Campagnuolo*, 556 F.2d 1209, 1214 (5th Cir.1977). In this case it is clear that no "subterfuge" occurred. The government uncovered the very conspiracy it identified in its original application, and the conspiracy was conducting the very activities listed; the government simply charged Harvey under a different statute than the one set forth in the application. The government argues with some force that requiring approval under section 2517(5) would simply elevate form over substance.

[14] We hold, however, that regardless of whether the government was required to seek judicial approval, the continuing approval of the authorizing district court, after it had been apprised of the conversations intercepted, meets the judicial approval requirement.[7] The purpose of the judicial approval limitation is to prevent incidental interception of conversations for which the government has shown no probable cause; the statute does not ensure that a defendant is charged only with the crimes set forth in the application. In considering whether the judicial approval required by the statute has occurred, courts must keep in mind this purpose. *Cf. United States v. Campagnuolo*, 556 F.2d 1209, 1214 (5th Cir.1977). Courts thus have considered the section 2517(5) approval

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[7] Because we hold that the judicial approval requirement was satisfied in this case, we do not consider whether the government is correct in arguing that the indictment did not charge "offenses other than those specified in the order of authorization." 18 U.S.C. §2517(5). *See e.g.*, *United States v. Brodson*, 528 F.2d 214 (7th Cir.1975); *United States v. Daly*, 535 F.2d 434 (8th Cir.1976), *see also infra* note 8.

requirement flexibly, and have held that the court need not have approved of the new charges as long as it has approved of the collection of the evidence supporting those charges. *See United States v. Masciarelli*, 558 F.2d 1064, 1067-69 (2d Cir.1977) (section 2517(5) approval impliedly made by authorizing judge who extended surveillance after being told of evidence supporting charges not asserted in application); *United States v. Tortorello*, 480 F.2d 764, 782-83 (2d Cir.), *cert. denied*, 414 U.S. 866, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973). Here the authorizing judge received both progress reports and applications for extension, and these described the nature of the conversations being intercepted. The authorizing judge twice extended the surveillance. Accordingly, he reviewed the conversations which the government had been intercepting, and determined that they were properly intercepted. This suffices to meet section 2517(5) requirement.

G. Compliance with 18 U.S.C. §2517(5) with Respect to Use of Evidence from the State Wiretap

Appellants complain that the government used evidence obtained through the state wiretap without obtaining proper or timely approval as required by section 2517(5). The federal agents learned of the existence of a state wiretap on October 14, 1980. They did not obtain approval to use the evidence until August 1982. The approval was from the Florida circuit judge who had authorized the state surveillance. The appellants raise several arguments in support of their claim that the approval was improper and untimely; none of the arguments requires extensive discussion.

[15] Appellants maintain that the application to use the state evidence was not properly approved because section 2516(1) requires approval from an attorney general or assistant attorney general. Section 2516(1) does not apply to an application to a state judge for approval; it applies only to applications submitted to a "Federal judge of competent jurisdiction." Such authorization does not allow further monitoring, but simply allows use of conversations already intercepted. We hold that no special approval is required before submission of section 2517(5) applications to state courts.

[16] The appellants further claim that the state judge's authorization was invalid because there is no indication that he made the finding "that the contents were otherwise intercepted in accordance with the provisions of this chapter," required by section 2517(5). They note that the government's application made no effort to show that the communications were properly intercepted. We disagree. The state judge expressly found that the interceptions related to the federal charges were "intercepted incidentally." This was the same judge who had authorized the state wiretap, and accordingly he was in a position to know whether the state agents had properly executed the state wiretap. The finding that the conversations were intercepted incidentally makes complete sense as both the state and federal agents were investigating violations of marijuana laws. Appellants cite no evidence contrary to this finding.

[17] Section 2517(5) requires that applications for approval be made "as soon as practicable." Appellants insist that the government learned of the state wiretap on October 14, 1980, and that it should not have waited

until August 9, 1982, to obtain approval. We hold that the government's request was timely. In considering the timeliness issue, we must keep in mind the purpose of section 2517(5), to prevent subterfuge. *United States v. Vento*, 533 F.2d 838, 855 (3rd Cir.1976). We reiterate that the federal and state investigators were investigating precisely the same activity, and there is no hint that the state wiretap was a subterfuge to generate evidence for federal charges. Moreover, although the federal agents learned of the existence of the state wiretap in October 1980, they did not learn the *contents* until March 1982. Accordingly, the delay was only five months. Finally, the appellants have not shown any prejudice from the delay. *Vento*, 533 F.2d at 855, *United States v. Southard*, 700 F.2d 1, 30-31 (1st Cir.), *cert. denied*, 464 U.S. 823, 104 S.Ct. 89, 78 L.Ed.2d 97 (1983).[8]

[18] According to the appellants, however, the agents used the information from the state wiretap to obtain the indictment against Harvey, and use of the evidence before obtaining the approval violated section 2517(5). The evidence cited by appellants is testimony by Darryl Falls, a witness who was implicated in the state evidence. Appellants argue that the testimony was the fruit of the state wiretap, and that therefore approval was required prior to use of the testimony. We disagree. Section 2517 enumerates three situations in which use or disclosure of intercepted communications is permissible. 18 U.S.C. §2517(1-3). By its terms, the requirement of approval for use of evidence set forth in

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[8] Because we find that the government did not violate 2517(5), we need not consider under what situations, if any, such a violation would mandate suppression. *See Vento*, 533 F.2d. at 855 (suggesting no suppression for 2517(5) violations).

section 2517(5) applies only to use of the evidence under section 2517(3). Section 2517(3) concerns disclosure of the communication or evidence derived from the communication while testifying under oath. The testimony of coconspirator Falls obviously came from personal knowledge rather than from the surveillance; he did not disclose any evidence obtained from the surveillance and his testimony was therefore not within section 2517(3). Nor did any other witness before the grand jury relay the contents of any conversations intercepted in the state wiretap or any other evidence discovered by the witness as a result of the state wiretap. Accordingly, section 2517(5) approval was not necessary before the grand jury proceeding.

[19] Finally, the appellants challenge the authority of the state circuit judge to enter the approval order. Section 2517(5) requires approval by "a judge of competent jurisdiction." The statute includes the following within the definition of a judge of competent jurisdiction:

> a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications.

18 U.S.C. §2510(9)(b). The approving judge, a Florida circuit judge, is authorized to enter such orders under Fla.Stat.Ann. §934.02(8).

For the foregoing reasons, the order of the district court denying the motion to supress is AFFIRMED.

II. TRIAL ISSUES

A. Severance

The appellants who went to trial all claim that they were entitled to a severance from the trial of Gainer Jernigan. Unlike the other defendants, Jernigan was charged with a continuing criminal enterprise violation under 21 U.S.C. §848. The appellants point out that in order to avoid conviction under 21 U.S.C. §848, counsel for Jernigan adopted a strategy of admitting involvement in a conspiracy, but denying that Jernigan played a key role. According to appellants this strategy prejudiced their defense.

Claims of severance are governed by familiar principles. Persons indicated together ordinarily should be tried together. A motion for severance is a matter within the sound discretion of the district court. "To establish an abuse of discretion the defendant must demonstrate that without severance he was unable to receive a fair trial and that he suffered compelling prejudice against which the trial court could offer no protection." *United States v. Magdaniel-Mora*, 746 F.2d 715, 718 (11th Cir.1984).

[20] Antagonistic defenses may satisfy the compelling prejudice standard, but only if the defenses are "irreconcilable and mutually exclusive." *Id.* In *United States v. Crawford*, 581 F.2d 489, 491 (5th Cir.1978), a prosecution for possession of an unregistered weapon, the two defendants took the stand and each testified that the other had possessed the weapon. The court stated that "[e]ach was the government's best witness

against the other," and found compelling prejudice. 581 F.2d at 492. Mere hostility between defendants, however, does not meet the compelling prejudice standard. In *United States v. Vadino*, 680 F.2d 1329, 1334-35 (11th Cir.1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1771, 76 L.Ed.2d 344 (1983), one defendant argued entrapment, and admitted most of the matters asserted by the prosecution; the court ruled that such a defense did not result in compelling prejudice to the other defendants. *See also United States v. Mota*, 598 F.2d 995, 1000-01 (5th Cir.1979) (defense of insanity not irreconcilable with codefendant's defense of noninvolvement), *cert. denied*, 444 U.S. 1084, 100 S.Ct. 1042, 62 L.Ed.2d 770 (1980).

[21] Compelling prejudice did not exist in this case. Jernigan's counsel did admit that Jernigan was likely guilty of some crime; however, the focus of her arguments was that *Harvey* was the primary culprit, and that Jernigan was simply a small player in Harvey's gang. Harvey did not go to trial; appellants, therefore, hardly can argue compelling prejudice. Appellants point to only two incidents in which Jernigan's counsel implicated other defendants. First, in the course of a cross-examination regarding a phone call between appellants Cason and Jernigan, counsel asked questions concerning whether Jernigan had been giving orders to Cason. These questions simply tended to exonerate Jernigan from the continuing enterprise charge while not further implicating Cason. In her closing, counsel referred to Jernigan as "a glorified Buck Van Horn." Although a statement comparing one defendant's guilt to another's is hardly desirable, it did not result in compelling prejudice. The statement presented no evidence or argument in favor of convicting Van Horn;

moreover, a jury could accept counsel's basic argument that Jernigan was simply one of many workers without necessarily finding that Van Horn, or any of the other defendants, was guilty.

We also note that neither Jernigan nor any of the appellants introduced evidence at trial. It would be unusual to find compelling prejudice from a codefendant's defense when that defense did not entail presentation of evidence. *See United States v. Magdaniel Mora*, 746 F.2d 715, 718 n. 3 (11th Cir.1984). Finally, the trial court gave explicit curative instructions during counsel's closing argument, instructing the jury to consider the guilt or innocence of each defendant separately. Accordingly, we find that the appellants have not met the compelling prejudice standard and that the district court was within its discretion in denying a severance.

B. Misjoinder of Appellant Sikes

Appellant Sikes contends that he was misjoined under Federal Rule of Criminal Procedure 8(b). The indictment contained twenty-three counts. The first two counts were continuing criminal enterprise charges against Jernigan and Harvey under 21 U.S.C. §848. Count III alleged a conspiracy to import marijuana. Count IV alleged a conspiracy to possess marijuana with intent to distribute. The remaining counts alleged various substantive violations of the marijuana laws. Sikes was named only in the conspiracy counts. The conspiracy counts included seventy-one overt acts, and named Sikes in only four of them. Sikes argues that he was misjoined because the conspiracies alleged in Counts III and IV are actually multiple unrelated conspiracies, and because the substantive counts are all unrelated to his participation.

The overt acts contained in the conspiracy counts showing participation of Sikes were discussions between Harvey and Sikes on November 18, 1980. Harvey, Sikes, and codefendant Dennis Kay discussed future marijuana off-loads, and division of profits from past sales; Harvey asked Sikes to take possession of 20,000 pounds of marijuana; Harvey and Sikes discussed a payment to a supplier, Sikes told Harvey that codefendant John Bertelsen had recently paid Sikes $125,000. The other overt acts refer to separate episodes of importation, in which Sikes is not named.

[22] We conclude that Counts III and IV set forth a single conspiracy, in which Sikes was a member. This court has decided numerous cases involving claims of multiple conspiracies, and some simple principles are relevant. A coconspirator need not participate in every phase of the venture. Nor need a conspirator be aware of all of the participants. Three factors support a finding of a single conspiracy common goal, common scheme, and overlapping participants. *United States v. Brito*, 721 F.2d 743, 747 (11th Cir.1983). The hallmark of a single conspiracy is "a regularized pattern of activity involving a significant continuity of membership and directed toward a common goal." *United States v. Darby*, 744 F.2d 1508, 1542 (11th Cir.1984). The indictment here shows a common goal of systematic and repeated importation and distribution of large amounts of marijuana. The indictment shows overlapping participation by the various defendants. The indictment shows a common scheme of off-loading and distribution. With

specific reference to Sikes, it shows his knowledge of both off-loading and distribution, his knowledge of other members of the conspiracy, and knowledge of past, present and future activities of the conspiracy. Accordingly, Sikes was properly joined in Counts III and IV.[9]

Sikes also argues that the substantive counts, in which he was not named, were improperly joined with the conspiracy counts. A defendant need not be named in all counts of the indictment. If the substantive charges in which the defendant is not named all arise out of the same conspiracy then joinder is proper. *See, e.g., United States v. Phillips*, 664 F.2d 971, 1016 (5th Cir. Unit B, 1981), *cert. denied*, 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982); *United States v. Corbin*, 734 F.2d 643, 649 (11th Cir.1984) (proper test is whether charges arise out of "series of acts or transactions" as shown by "substantial identity of facts or participants"). All of the substantive counts relate to the marijuana importation and distribution activities of the conspiracy. We have already determined that the indictment set forth a single conspiracy, in which Sikes was a member. Accordingly the conspiracy counts were not misjoined with the substantive counts.

C. Revelation of the Location and Type of Surveillance Equipment Employed

Despite numerous requests, the district court would not allow the appellants to discover either the type of microphone used in Harvey's office, or where the microphone was hidden. The appellants contend that consequently they were deprived of the right to confront the witnesses against them. The government resisted such revelations on the ground that they would adversely affect future criminal investigations. It asks us to recognize a privilege not to disclose the location and type of equipment used in surveillance unless the defendant demonstrates that such information is relevant and helpful to the defense.

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[9] Since this case was briefed, the Supreme Court decided *United States v. Lane*, ____ U.S. ____, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986), holding that misjoinder is subject to the harmless error doctrine. As we have decided that joinder was proper, we need not consider prejudice.

[23] We recognize a qualified government privilege not to disclose sensitive investigative techniques. In *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the Supreme Court acknowledged the existence of an "informer's privilege." The Court stated that the government has a privilege to withhold the identity of persons who furnish information of violations of law to the police, reasoning that the privilege furthered effective law enforcement by encouraging citizens to come forward with relevant information. 353 U.S. at 59, 77 S.Ct. at 627. The privilege must give way, however, where the informant's identity of knowledge is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id.* at 60-61, 77 S.Ct. at 627-28.

The District of Columbia Circuit has applied the *Roviaro* privilege to surveillance locations. *See United States v. Harley*, 682 F.2d 1018, 1020-21. (D.C.Cir.1982); *United States v. Green*, 670 F.2d 1148 (D.C.Cir.1981). In *Green*, a police officer using binoculars observed the defendant committing a drug transaction. The defendant wished to identify the precise location of the officer's observation post. The court ruled that the information was privileged.

> Just as the disclosure of an informer's identity may destroy his future usefulness in criminal investigations, the identification of a hidden observation post will likely destroy the future value of that location for police surveillance. The revelation of a surveillance location might also threaten the safety of police officers using the observation post, or lead to adversity for cooperative owners or occupants of the building. Finally, the assurance of nondisclosure of a surveillance location may be necessary to encourage property owners or occupants to allow the police to make such use of their property.

670 F.2d at 1155. *Green* was decided in the context of a motion to suppress; the District of Columbia Circuit extended the privilege to trial testimony in *Harley.* In *Harley* two officers observed a drug transaction, one using binoculars, the other video-taping it with a zoom lens. Again, the defendants attempted to learn the precise viewing location. The court held that the defendant's right to confront witnesses was not violated in light of the government's interest in keeping its surveillance post secret, and the defendant's failure to show a need for the evidence. 682 F.2d at 1020-21. In considering the defendant's need, the court reasoned that the jury could judge the observer's ability to identify by seeing the video tapes made from the surveillance spot, and from testimony of the approximate distance. *See also United States v. Crumley,* 565 F.2d

945, 950-51 (5th Cir. 1978) (government need not reveal where "track sheet" identifying vehicle parts was hidden unless defendant shows need).

[24] We hold that the privilege applies equally to the nature and location of electronic surveillance equipment. Disclosing the precise locations where surveillance devices are hidden or their precise specifications will educate criminals regarding how to protect themselves against police surveillance. Electronics surveillance is an important tool of law enforcement, and its effectiveness should not be unnecessarily compromised. Disclosure of such information will also educate persons on how to employ such techniques themselves, in violation of Title III.

The privilege will give way if the defendant can show need for the information. In this case the appellants contend that the information was necessary to demonstrate that the voices on the tapes could have been distorted, resulting in improper voice identifications. They insist that testimony of Agent Copus and their own expert witness indicated that the location of the microphone could have resulted in distortion.

[25] The district court conducted an in camera hearing to review the government's assertion of privilege and held a hearing on the appellants' claim of necessity. We agree with the district court that the information was privileged and that the defendants did not demonstrate necessity. There was testimony that the voices *could* have been distorted by the way the microphone was hidden. The district court, however,

listened to Agent Copus, who was monitored from Harvey's office during the course of the investigation and was able to compare Agent Copus' voice on the tapes with his actual voice and determine that the voice had been accurately recorded. The appellants were allowed to examine the tapes, and were informed that the transmission was by air rather than wire. The ultimate question of whether the voice identifications of the appellants were correct was given to the jury and the appellants were allowed to explore and argue the possibility of misidentification in front of the jury. Accordingly, we agree with the district court's finding that necessity was not shown in this case.

We stress that the necessity determination requires a case by case balancing process, and that we have established no fixed rules about the discoverability of electronic surveillance techniques in criminal cases. *See Roviario v. United States*, 353 U.S. 53, 60, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957); *United States v. Harley*, 682 F.2d 1018, 1020 (D.C.Cir.1982).[10]

D. Timeliness of the Government's Request for Voice Exemplars

During the eighth week of trial, the government requested that the appellants provide voice exemplars, to be played before the jury in order to confirm the identifications. Appellants Sikes and Bertelsen concede that the government had the right to compel the defendants to give exemplars, *see United States v. Dionisio,* 410 U.S. 1, 93 S.Ct. 754, 35 L.Ed.2d 67 (1973), but argue that the government's request came too late.

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[10] The appellants also contend that the Classified Information Procedures Act, 18 U.S.C. app. iv., applies to the information they sought. Appellants are wrong. The district court did not find that the information was classified nor do appellants provide any reason why it should have. *See* 18 U.S.C. app. iv §I (defining classified information); *United States v. Panas*, 738 F.2d 278, 285-86 (8th Cir. 1984).

The appellants contend that the district court's standing discovery order required the government to disclose its intention to seek voice exemplars. That order, requiring the government to disclose statements of the appellants within its "possession, custody, or control," parallels the requirements of Rule 16. According to appellants, because the government had the authority to compel exemplars, the exemplars were within its control and the government was bound to disclose that it intended to seek them. This argument is absurd. The discovery order applied to statements the government had, not statements that it could have had.

[26] In any event, the appellants have shown no prejudice from the government's delay. The complain that they had become committed to the defense of improper identification, but they provide no alternative theory of defense which they could have presented had they known the government intended to seek voice exemplars. Indeed, in light of the contents of the tapes, improper identification appears to have been the most logical defense.

E. Admissibility of Intercepted Conversations Referring to Bertelsen's Arrest

Appellant John Bertelsen was arrested for loitering and prowling near a Coast Guard Station on October 1,

1980. Numerous other members of the conspiracy were also arrested on that day. The state Title III wiretap on Jernigan's phone intercepted conversations about the arrests, the various charges, and obtaining releases and included mention of Bertelsen's arrest. The government has conceded that the arrest of Bertelsen was unlawful. Bertelsen claims, therefore, that the conversations about the arrest should have been excluded, and that the government should not have been allowed to argue that the conversations demonstrated Bertelsen's connection with the conspiracy.

[27, 28] We hold that the conversations of Bertelsen's coconspirators regarding his arrest were not the product of the illegal arrest. Evidence seized during an unlawful arrest, or statements made by the person unlawfully arrested while in custody, are products of the arrest and will be suppressed. Evidence with only a loose causal connection to an illegal arrest, however, will not be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963). The mere existence of a "but for" causal connection does not mandate suppression. *Dunaway v. New York*, 442 U.S. 200, 217, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824 (1979); *United States v. Bailey*, 691 F.2d 1009, 1013 (1982), *cert. denied*, 461 U.S. 933, 103 S.Ct. 2098, 77 L.Ed.2d 306 (1983). In this case, the causal connection was broken by the intervening acts of third parties. The challenged evidence is not a statement made by Bertelsen, but statements made about Bertelsen by third parties. Accordingly, the evidence was not the fruit of the illegal arrest and suppression was not required.

F. Use of Prior Similar Act Evidence Against Campbell

[29] Appellant Campbell complains that the government used similar act evidence against him in violation of a prior agreement. The evidence demonstrated that Campbell had been arrested and convicted on state marijuana charges in 1978. After the conviction, Campbell and the federal government entered into an agreement in which the government agreed not to pursue any criminal or civil liability arising out of the event; Campbell agreed to forfeit a vessel to the United States.

The use of evidence of the prior arrest did not violate the agreement. The government agreed not to pursue any charges for the events leading to the arrest. The government did not agree to never use the arrest as evidence in a prosecution for subsequent criminal activity.

G. Sufficiency of the Evidence with Respect to Convictions Under 18 U.S.C. §1001

Appellants Marion Van Horn and Gary Balough were convicted of conspiracy to make false statements in violation of 18 U.S.C. §1001. The appellants contend that there was sufficient evidence to prove that they agreed to make false statements, that the false statements were not material and that the "exculpatory no" exception to section 1001 applies.

Agreement

[30] In considering the sufficiency of the evidence to convict we view the evidence in the light most favorable

to the government, with all reasonable inferences drawn in favor of the jury's verdict. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). With respect to whether the appellants reached an agreement with Harvey to make false statements, the evidence is clear. The evidence disclosed that on several occasions Harvey and Van Horn discussed what Van Horn should say to the FBI and that Van Horn agreed to lie to the FBI about his connection with the conspiracy and about Harvey. Overt acts were committed in futherance of the conspiracy: on November 21, 1980, Van Horn spoke with the FBI and told the agents that Harvey had instructed him to cooperate fully.

With respect to Balough, an intercepted conversation on November 18, 1980, provided sufficient evidence to convict. Harvey and Balough discussed what Balough should say to FBI investigators; in particular, they discussed how to portray Harvey's relationship with his girl friend Trudy Stalker. Harvey had given Stalker expensive gifts, which he feared would raise suspicion. Harvey and Balough agreed that Balough would tell agents that Stalker was a race car groupie, and that Harvey had not purchased gifts for her. They also discussed what Stalker was to say. An overt act was committed in furtherance of the conspiracy as Stalker spoke to FBI agents.

Materiality

[31, 32] A statement is material for the purposes of section 1001 if it has a " 'natural tendency to influence, or be capable of affecting or influencing, a governmental function.' " *United States v. Lopez*, 728 F.2d 1359, 1362 (11th Cir.1984) (quoting *United States v. McGough*, 510

F.2d 598, 602 (5th Cir.1975)), *cert. denied*, ____ U.S. ____, 105 S.Ct. 112, 83 L.Ed.2d 56 (1984). The statements need not have exerted actual influence, so long as it had the capacity to do so. *Id.* The statement that the conspirators agreed to in this case were material. Harvey was the main target of the FBI investigation, and Van Horn agreed to mislead the FBI about Harvey. The record indicates the FBI was interested in using Stalker to obtain information about Harvey, and the misstatements Balough agreed to make would have misled the FBI about Harvey's relationship with Stalker.

Exculpatory No

[33] The "exculpatory no" exception to section 1001 was established in this circuit in *Paternostro v. United States*, 311 F.2d 298 (5th Cir.1962). There the court held that section 1001 did not cover negative exculpatory responses to questions propounded by an investigating agent during a conference not initiated by the interviewee. *Id.* at 309. The exception is based both on the purpose of the statute and the fifth amendment right against self-incrimination. The exception therefore does not apply when a person attempts to affirmatively mislead a government investigation. *United States v. Krause*, 507 F.2d 113 (5th Cir.1975) (defendant used "aggressive action" to mislead NLRB investigation); *United States v. Bush*, 503 F.2d 813, 818 (5th Cir.1974) ("there is a valid distinction between negative exculpatory denial of a suspected misdeed and an affirmative representation of facts peculiarly within the knowledge of the suspect not otherwise obtainable by the investigator.").

[34] The discussions between Harvey and Van Horn do not simply show an intent that Van Horn deny wrongdoing, but an intent that Van Horn lead the FBI investigation away from Harvey. On November 18, Harvey and Van Horn discussed an upcoming FBI interview, and Van Horn's denial of knowledge of involvement by Harvey. On November 21, Van Horn reported to Harvey that he had told the FBI that Harvey wanted him to cooperate. On December 30, Harvey theorized to Van Horn that the FBI would offer Van Horn immunity. They also discussed a lawyer for Van Horn; Harvey agreed to pay for one, but told Van Horn not to tell the FBI about it. Van Horn did not simply agree to deny personal wrongdoing, but to mislead the FBI about Harvey. Accordingly, the exculpatory no exception does not apply.

Similarly, the exculpatory no does not apply to Balough's agreement to lie on behalf of Harvey; Balough did not agree simply to deny connection with Harvey, but to affirmatively steer the FBI in the wrong direction.

For the reasons stated, the convictions are AFFIRMED.

ON PETITIONS FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

(Opinion Oct. 15, 1985, 11th Cir.1985,
773 F.2d 1158)

UNITED STATES OF America,
Plaintiff-Appellee,

v.

Marion VAN HORN, Scott Bertelsen, Gary Balough, Dennis Kay, Robert Van Horn, Dennis Cason, Thomas Sikes, John Crosby Bertelsen, Joseph William Campbell, Defendant-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

William Joseph HARVEY, a/k/a Billy,
Defendant-Appellant.

Nos. 83-5102, 84-5138.

United States of Court of Appeals,
Eleventh Circuit

July 25, 1986.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 23, 1986, 11 Cir.,
789 F.2d 1492).

Before FAY and KRAVITCH, Circuit Judges, and HENLEY*, Senior Circuit Judge.

PER CURIAM:

The opinion of the court filed on May 23, 1986 is modified as follows:

The first sentence of the first paragraph of the slip opinion at page 3610 is hereby deleted and the following substituted:

We also note that Jernigan did not introduce any evidence at trial.

The text of footnote 1 on page 3597 is hereby deleted and the following substituted:

> Appellant Harvey went to trial before the district court judge based on a stipulated trial transcript and was convicted. The remaining appellants went to trial and were convicted by a jury.

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*Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

The Petition for rehearing by the panel is DENIED. No member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing enbanc, the suggestion for rehearing en banc is DENIED.

UNITED STATES of America,

Plaintiff,

v.

William Joseph Harvey, et al.,

Defendants.

No. 82-73-Cr-SMA.

United States District Court,
S.D. Florida,
Miami Division.

Aug. 30, 1982.

On Motion to Vacate Restraining Order
Feb. 14, 1983.

In prosecution brought under, inter alia, the continuing criminal enterprise statute, defendants moved to suppress electronic surveillance and any evidence derived therefrom. The District Court, Aronovitz, J., held that: (1) probable cause was established for initial electronic surveillance order as well as the extensions; and (2) order authorizing use of state wiretap evidence did not violate statutory provision requiring subsequent application prior to disclosure or use of incidentally intercepted communications. Upon one defendant's motion to vacate a restraining order permitting him from disposing of his beneficial interests in assets during pendency of the criminal proceedings against him and upon his alternative motion for an adversary hearing, the District Court held that: (3) defendant was entitled to a probable cause type of hearing; and (4) Government showed by a preponderance of the evidence that it would likely convince jury, beyond a reasonable doubt, that defendant committed three or more federal narcotics violations in concert with five or more persons and that the assets which were subject of restraining order were subject to forfeiture under continuing criminal enterprise statute; thus, district court would not vacate restraining order which prevented defendant from selling or transferring his beneficial interest in the assets during pendency of criminal proceedings against him.

Motions to suppress denied; motion to vacate restraining order denied.

1. **Telecommunications —492**

Federal electronic surveillance statute is constitutional. 18 U.S.C.A. §2510 et seq.

2. **Telecommunications —512**

Wiretap order was properly authorized inasmuch as general order of delegation survived resignation of Attorney General who gave the initial authorization. 18 U.S.C.A. §2516.

3. **Telecommunications —519**

Wiretap order was not invalid on ground that it authorized FBI to conduct drug-related surveillance where RICO allegation in the investigation was not limited to strictly drug-related offenses but also allegedly involved bribery of public officials, murder, stolen car engines and other offenses. 18 U.S.C.A. §§ 1961, 1962, 2510(7), 2516, 2518(4)(d).

4. **Telecommunications —519**

It is not necessary for FBI to have specific investigation responsibilities for specific offenses before it can participate in court-approved interceptions directed at those offenses. 18 U.S.C.A. §2516.

5. **Commerce —82.5**

Marijuana related drug offenses may be predicate to racketeering acts under RICO. 18 U.S.C.A. §1961(1)(D).

6. **Telecommunications —515**

Same probable cause standard which exists for search warrants is applicable to wiretaps; probable cause exists where facts and circumstances within affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe than an offense is being committed, has been committed, or is about to be committed. 18 U.S.C.A. §2518.

7. **Telecommunications —515, 530**

In issuing a wiretap order, judge must exercise his own judgment, gleaned from a common sense reading of the entire affidavit, as to whether the facts alleged constitute probable cause and when judge or magistrate acts in that manner, his determination as to probable cause is conclusive in absence of arbitrariness, i.e., a judge's determination of probable cause should be accorded great deference by reviewing courts as long as he performs his independent function and did not merely serve as a rubber stamp for the police. 18 U.S.C.A. §2518.

8. **Telecommunications —515**

Where much of the information in affidavit in support of application for wiretap order comes from confidential informants, magistrate's or judge's search for probable cause must be guided by and measured against a standard set forth in *Aguilar v. Texas* and *Spinelli v. United States.*

9. **Telecommunications —515**

Affidavit, which established reliability of informants and revealed that the informants had furnished information to FBI over a protracted period of time which displayed intimate detail that could come only from persons who were integrally situated within circle of defendant's activities which, when combined with FBI's independent corroboration of much of the information through verification of nonincriminating facts, would lead a man of reasonable prudence to believe that an offense had been committed based upon the facts and circumstances contained in the affidavit, established probable cause for issuance of electronic surveillance order.

10. **Telecommunications —515**

To warrant electronic surveillance under RICO, Government was not required to prove a prima facie case of RICO conspiracy in its application but was required only to show the probable cause standard of probability that there was, is, or would be a RICO violation; furthermore, Government was not required to set forth sufficient facts for issuing judge to conclude that there was probable cause to believe that each person named as a person whose conversations would probably be intercepted committed the offenses. 18 U.S.C.A. §2518(1)(b).

11. **Telecommunications —515**

Initial probable cause for electronic surveillance to gather information concerning an ongoing narcotics conspiracy did not become stale during first 30-day period of electronic surveillance because first three five-day progress reports did not show any progress.

12. **Telecommunications —516**

Showing by Government that other methods had failed or reasonably appeared to be unlikely to succeed if tried or would be too dangerous was sufficient to support electronic surveillance order. 18 U.S.C.A. §2518(3).

13. **Telecommunications —516**

The more traditional techniques need not be exhausted if they are impractical or costly and inconvenient in order to obtain an electronic surveillance order. 18 U.S.C.A. §2518(3).

14. **Telecommunications —516**

For purposes of obtaining an electronic surveillance order, determination that other investigative techniques will not succeed may not be based upon affidavits that include only bare conclusory statements. 18 U.S.C.A. §2518(3).

15. Telecommunications —516

Statute governing electronic surveillance does not require that all possible techniques be tried before a wiretap may be authorized; rather, its purpose with regard to requiring a showing of alternative investigative techniques is to inform issuing judge of the difficulties involved in the use of conventional techniques. 18 U.S.C.A. §2518(1)(c),(3)(c).

16. Telecommunications —516, 530

In ruling upon propriety of issuance of electronic surveillance order, courts will not set unduly burdensome standards on Government's demonstration that no reasonable alternative existed; consideration discretion rests with issuing judge in deciding whether other investigative methods might have been successfully employed. 18 U.S.C.A. §2518(1)(c), (3)(c).

17. Telecommunications —527

Sealing requirements of federal electronic surveillance statute were not violated as result of fact that the original intercepted tapes from initial 30-day period were not sealed until the end of entire surveillance or that no directions were contained in the order as to care, custody or sealing of tapes. 18 U.S.C.A. §2518(8).

18. Telecommunications —528

With regard to service of notice of inventory, federal statute governing electronic surveillance requires no more than reasonable efforts to reach persons within statute's inventory group and suppression is mandated only if the defendants receive notice on eve of trial and were able to show prejudice resulting from delay or noncompliance. 18 U.S.C.A. §2518(8)(d).

19. Criminal Law —394.3

Suppression of evidence obtained for use of electronic surveillance would not be ordered for delay or noncompliance with statutory requirement concerning service of notice of inventory where no defendant was able to show prejudice resulting from the delay or noncompliance. 18 U.S.C.A. §2518(8)(d).

20. Telecommunications —515

Government can rely on conversations intercepted during initial electronic surveillance to provide probable cause for renewal as well as relying upon probable cause supplied in the initial application.

21. Telecommunications —519

It is permissible that a wiretap continue until Government accumulates enough evidence to determine scope of the conspiracy and identify individuals involved.

22. Telecommunications —515

Progress reports indicating conversations dealing with drug transactions, initial application and application for extension and affidavits of initial and extension orders supported finding of probable cause for an extension of wiretap order.

23. Telecommunications —513

District judge had authority to execute an order extending electronic surveillance while outside his territorial jurisdiction where the order was operative within his territorial jurisdiction.

24. Criminal Law —394.3

There was no basis for suppression of results of electronic surveillance for failure to include a certain defendant in earlier applications and orders as a "target" of the surveillance where FBI only identified that individual as a person known to be committing the offense and whose conversations were likely to be intercepted at a date subsequent to initial application and order and initial extension application and order; thus, evidence obtained by surveillance both before and after order authorizing an intercept of that defendant's conversations could be used against him. 18 U.S.C.A. §2518(1)(a).

25. **Telecommunications —515, 529**

Although federal statute governing continuing criminal narcotics enterprises was not specifically cited in application for order authorizing electronic surveillance, affidavit set forth probable cause as to each of the elements of an offense under that statute and therefore Government was not required to obtain subsequent authorization to disclose product of electronic surveillance revealing violation of statute governing continuing criminal narcotics enterprises. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408, 21 U.S.C.A. §848; 18 U.S.C.A. §2517(5).

26. **Telecommunications —511**

Where authorizing judge is presented with applications to extend electronic surveillance, affidavits in support thereof, and/or progress reports of the interceptions obtained, and upon examination of those materials the judge grants authorization for an extension of the surveillance, that subsequent approval satisfies requirements of statutory provision requiring a subsequent application prior to disclosure of incidentally intercepted comunications if the supplemental materials disclosed to judge that communications relating to offenses other than those specified in the original application, affidavit and order were intercepted. 18 U.S.C.A. §2517(5).

27. **Telecommunications —520**

Although statute governing continuing criminal narcotics enterprises was not specifically cited in application for order authorizing electronic surveillance, trial judge, in issuing extension orders, gave implicit approval and authorization for interception of communications relating to violations of that statute and therefore Government satisfied requirements of statutory provision requiring subsequent application prior to disclosure or use of incidentally intercepted communications. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408, 21 U.S.C.A. §848; 18 U.S.C.A. §2517(5).

28. Criminal Law —394.3

Unintentional omission of one page from 55 page affidavit, which contained information regarding a previous state wiretap of which one defendant was the target, did not warrant suppression of product of electronic surveillance for violation of provisions of federal wiretap statute relating to disclosure of previous applications, approval of application by designated official, or showing of necessity for electronic surveillance in application where the omission of the page did not detract from sufficiency of the enumerated factors necessary for authorization of the interceptions and where a full and complete application was submitted to and approved by Justice Department and where judge as subsequently apprised of the prior state wiretap. 18 U.S.C.A. §§ 2516, 2518(1)(b), (3)(c).

29. Criminal Law —394.3

Omission of one page from 55 page affidavit for wiretap order, which contained reference to a state wiretap of which one defendant was a target, did not provide a basis for suppression of product of the electronic surveillance where defendants failed to prove an intentional omission or reckless disregard for the truth and where inclusion of the omitted page in the affidavit would not have vitiated the probable cause showing.

30. Telecommunications —515

Affidavit for wiretap order is invalid only if it is shown by a preponderance of the evidence that it contains knowing and intentional material misrepresentations, where there has been a reckless disregard for the truth as to material matters, and without the false material, the affidavit is insufficient to establish probable cause.

31. Telecommunications —520

Government met its burden of establishing that minimization requirement was met with regard to interception of oral communications in office under surveillance in connection with an investigation of defendants' activities relating to narcotics trafficking. 18 U.S.C.A. §2518(5).

32. Telecommunications —520

In determining whether Government has met its burden of establishing that its electronic surveillance has met requirement that interceptions be conducted in such a way as to minimize the interception of communications not otherwise subject to interception, there must be an objective assessment of agents' actions in light of the facts and circumstances of their particular case in order to determine their reasonableness; three factors are considered in determining reasonableness: nature and scope of criminal enterprise under investigation, Government's reasonable interference of the character of a conversation from the parties to it, and extent of judicial supervsion. 18 U.S.C.A. §2518(5).

33. Criminal Law —394.3
Federal Courts —386

Validity of a state wiretap authorization is to be determined under state law; however, admissability of evidence at trial is governed by federal law.

34. Telecommunications —515

Affidavit for state wiretap order, which detailed information commencing over two years prior to the application relating to continuing pattern of criminal activity leading to violations of Florida narcotics laws and marijuana smuggling, established probable cause for issuance of state wiretap under Florida law, nothwithstanding contentions that information supplied by informants was insufficient and that the information was stale. West's F.S.A. §934.09(3).

35. Telecommunications —516

Affidavit submitted in support of application for state wiretap order demonstrated the statutory necessity to resort to the wiretap. West's F.S.A. §934.09(3).

36. Telecommunications —512

State wiretap order was not invalid on ground of improper authorization as result of fact that Florida State Attorney, who personally authorized police detective to apply a wiretap order, did not personally apply for wiretap order. West's F.S.A. §934.07.

37. Telecommunications —493

Florida law authorized wiretap for marijuana offenses. West's F.S.A. §934.07.

38. Telecommunications —529

Order authorizing use of state wiretap evidence did not violate statutory provision requiring subsequent application prior to disclosure or use of incidentally intercepted communications. 18 U.S.C.A. §2517(5).

39. Telecommunications —529

Testimony of witness presented to federal grand jury was not evidence derived from state wiretap and therefore did not require authorization prior to disclosure of witness' testimony. 18 U.S.C.A. §2517(5).

On Motion to Vacate Restraining Order

40. Criminal Law —1221

Hearsay testimony was admissible in evidentiary hearing in which defendant sought to vacate ex parte restraining order preventing him from selling, transferring, assigning, or otherwise disposing of any part of his beneficial interest in certain assets, which were subject to forfeiture under continuing criminal enterprise statute upon his conviction, during pendency of criminal proceedings against him. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408, 21 U.S.C.A. §848.

41. Criminal Law —1221

Defendant would be given a probable cause type of hearing after entry of ex parte order restraining sale or transfer of his interest in certain assets, which would be subject to forfeiture under continuing criminal enterprise statute, upon conviction, during pendency of criminal proceedings against him. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408(d), 21 U.S.C.A. §848(d).

42. Drugs and Narcotics —195.

Government showed by a preponderance of the evidence that it would likely convince jury, beyond a reasonable doubt, that defendant committed three or more federal narcotics violations in concert with five or more persons and that the assets which were subject of restraining order were subject to forfeiture under continuing criminal enterprise statute; thus, district court would not vacate restraining order which prevented defendant from selling or transferring his beneficial interest in the assets during pendency of criminal proceedings against him. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408, 21 U.S.C.A. §848.

Stanley Marcus, U.S. Atty., S.D. Fla., by Neil Karadbil, Asst. U.S. Atty., Miami, Fla., for plaintiff.

James Jay Hogan, Joseph Beeler, Miami, Fla., for defendants.

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ORDER DENYING MOTIONS TO SUPRESS TITLE III ELECTRONIC SURVEILLANCE AND EVIDENCE DERIVED THEREFROM AND INCLUDING DENIAL OF MOTION TO SUPPRESS STATE TITLE III WIRE INTERCEPT AND EVIDENCE DERIVED THEREFROM

ARONOVITZ, District Judge.

Defendants WILLIAM JOSEPH HARVEY, THOMAS SIKES and DENNIS KAY[1] addressed Motions to Suppress electronic surveillance and any evidence derived therefrom to a Title III oral intercept of communications of William Joseph Harvey, John Dennis Cason, Robert Jernigan, Bruce Emory Griffin, Wesley Simkins, Mike McCrary, Skip Hope, Arthur Michael Sakell, Joseph William Campbell, Jr., Gary Balough and Parker Peak, at the office of William Joseph Harvey, Defendant, located at 1945 South Dixie Highway, Delray Beach, Florida, a towing business conducted by Delray

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[1] The following Defendants have also filed Motions to Suppress the federal Title III electronic surveillance and/or the Florida state Chapter 934 wiretap: Robert Gainer Jernigan, Joseph William Campbell, Jr., Gary Balough, John Dennis Cason, Gene Johnson, Marion Van Horn, Robert Van Horn, John Bertelsen, Scott Bertelsen and Jay Jernigan. Several Defendants have also filed Motions to Join and/or Adopt the Motions to Suppress filed by other Defendants. The Motions to Join and/or Adopt are hereby GRANTED, but only insofar as the Defendants seeking to Join and/or Adopt are "aggrieved persons" as defined in the Act. See 18 U.S.C. §§ 2510(11), 2518(10)(a).

Towing Service, Inc., of which Harvey was alleged to be president.

The Honorable Eugene P. Spellman, U.S. District Judge, Southern District of Florida, entered the original order authorizing interception on October 20, 1980, for thirty (30) days (Defendant's Exhibit No. 4); an amended order on October 22, 1980 (Defendant's Exhibit No. 5); an order authorizing continued interception of oral communications for an additional thirty (30) days on November 20, 1980 (Defendant's Exhibit No. 16); and an order continuing interception for an additional thirty (30) days signed on December 19, 1980 (Defendant's Exhibit No. 26). The oral intercept commenced functioning on October 24, 1980, and remained in position and functioning until January 19, 1981.

A multitudinous attack has been made upon this Title III intercept. After reviewing extensively the original motions, all supplements thereto then pending, and the Government's omnibus response, this Court heard testimony and received evidence basically addressed to three (3) evidentiary issues, to-wit:

(1) The adequacy and sufficiency of minimization procedures and implementation;

(2) The effect of missing page 21C of the original affidavit of Harold Copus, Special Agent, F.B.I., not found among the unsealed original documents in this Title III intercept, as it related to the sufficiency of the affidavit itself to establish probable cause and as it related on a *Delaware v. Franks* [438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667], *infra*, basis and all issues arising from the omission of Page 21C from the original affidavit; and

(3) The adequacy of disclosure pursuant to 21 U.S.C. §2517(3) and (5) in terms of a prior Florida state Title III wiretap and the federal Title III wiretap *sub judice.* Evidence was received with respect to the State Title III disclosure issue.

All other matters raised by the Defendants in these Motions to Suppress were legal issues and were heard extensively in oral arguments. The evidentiary hearings were conducted over a period of four days and oral argument thereon lasted one full day. Thereupon, having now considered the original Motion of William Joseph Harvey, five (5) Supplements thereto, the Motions of Thomas Sikes and Dennis Kay and all Supplements thereto, and considering the joinder therein of all co-defendants who are "aggrieved" persons, the Government's omnibus response, the testimony and evidence adduced and oral arguments, and being otherwise fully advised in the premises, it is thereupon

ORDERED AND ADJUDGED that each and every Motion to Suppress the Title III oral intercept and the evidence derived therefrom, and including Motions to Suppress the Florida Chapter 934 wire intercept and evidence derived therefrom, addressed by each and every Defendant entitled to do so by law is hereby DENIED, each respectively, for the reasons hereinafter set forth.

Findings of Fact and Conclusions of Law are made herein when applicable and required for those matters as to which testimony and evidence were received at an evidentiary hearing.

I. CONSTITUTIONALITY OF 18 U.S.C. §§ 2516, 2518

[1] In its memorandum in support of the Motion to Suppress (p. 23) Defendant Harvey "candidly concedes that most federal and state courts faced with the issue have found Title III (18 U.S.C. §2510, *et seq.*) constitutional on its face. . . . For the purpose of appeal, this issue is once again here raised. . . ." In *United States v. Sklaroff*, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 142, 46 L.Ed.2d 105 (1975), the Fifth Circuit joined in the holdings of other circuits that Title III meets the constitutional tests for electronic surveillance set forth by the U.S. Supreme Court

in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) and *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1966). *See also United States v. Tortorello*, 480 F.2d 764 (2nd Cir.), *cert. denied*, 414 U.S. 866, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973); *United States v. Cafero*, 473 F.2d 489 (3rd Cir. 1973), *cert. denied*, 417 U.S. 918, 94 S.Ct. 2622, 41 L.Ed.2d 223 (1974). The statute in question is constitutional.

II. ALLEGED INVALIDITY OF ORDER UPON BASIS THAT AUTHORIZATION TO APPLY THEREFOR WAS NOT PERSONALLY DELEGATED

[2] 18 U.S.C. §2516 provides that the Attorney General or any Assistant Attorney General specifically designated by the Attorney General may authorize an application for a wiretap. Here, authorization was given by Assistant Attorney General Philip B. Heymann (in charge of the Criminal Division) pursuant to Order No. 799-78 entered by Attorney General Griffin Bell on August 15, 1978 (Defendant's Exhibit No. 21). In August, 1979, Attorney General Benjamin Civiletti succeeded the Honorable Griffin Bell as Attorney General, although no new Order was issued prior to the wiretap authorization nor was the August 15, 1978 Order revoked. Two courts have specifically addressed the contention of Defendants which attempts to narrowly construe wiretap authorization from being exercised by any individuals other than the Attorney General or Assistant Attorney General and the issue of whether a general order of delegation survives the resignation of Attorney General Griffin Bell. *United States v. Wyder*, 674 F.2d 224, 226-27 (4th Cir.), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2944, 73 L.Ed.2d 1340 (1982) and *United States v. Mallory*, 507 F.Supp. 99 (D.Md. 1981), both hold that the general rule that acts of administrative officials continue in effect after the end of their tenure until revoked or altered by their successors in office applies in the circumstances *sub judice*. The correspondence of October 16, 1980, from Philip B. Heymann, the Assistant Attorney

General in charge of the Criminal Division, to Philip Wilens, Director of the Office of Enforcement Operations, clearly demonstrates that the surveillance was properly authorized within the meaning of *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974). The specific designation was lawful because it delegated authority to the Assistant Attorney General of the Criminal Division, not a specific named individual. *United States v. Wyder, supra*, and *United States v. Mallory, supra; United States v. Todisco*, 667 F.2d 255 (2nd Cir. 1981), *cert. denied*, 455 U.S. 906, 102 S.Ct. 1250, 71 L.Ed.2d 444 (1982).

Some Defendants (not Harvey) also argue that paragraph 2 of the authorization order (Defendant's Exhibit No. 4) limits the Assistant Attorney General's authorized power to those situations under §2518(7) dealing with emergencies. The plain reading of the statute demonstrates that the authority is contained *in the conjunctive* and does not limit the power of the Assistant Attorney General to the specific emergency situations but instead permits the Assistant Attorney General to have additional authority to act specifically in emergency situations. This wiretap was not authorized under the §2518 emergency provision and the language in paragraph 2 of the authorization order is not applicable.

Section 2516 sets up a procedure for authorization to submit an application to a judge. It does not set forth the criteria for making application to a judge; rather, it defines the requirement of obtaining the Attorney General's authorization. Therefore, Defendant's argument that it was improper for the Assistant Attorney General to authorize U.S. Attorney Atlee Wampler, who in turn allegedly improperly authorized Assistant U.S. Attorney Stephen Gillman, is without merit. *United States v. Bowdach*, 366 F.Supp. 1368 (S.D. Fla. 1973), *aff'd* 501 F.2d 220 (5th Cir. 1974), *cert. denied*, 420 U.S. 948, 95 S.Ct. 1331, 43 L.Ed.2d 426 (1975).

Therefore, the authorization to apply for the subject order and its extensions was validly in force and exercised.

III. AUTHORIZATION OF F.B.I. AGENTS TO INVESTIGATE DRUG-RELATED OFFENSES

[3] 18 U.S.C. §2516 provides that applications may be made for authority by the FBI, or a federal agency having responsibility for the investigation of the offense as to which the application is made, to conduct the wiretap surveillance. Defendants argue that since §2518(4)(d) requires that the identity of the agency authorizing the intercept of the communication be set out in the order of authorization and since §2510(7) defines an investigative or law enforcement officer to mean an officer empowered by law to conduct investigations for offenses under §2516, the Court's order was invalid. Defendants argue that the order purported to authorize FBI personnel to conduct drug-related surveillance when responsibility for investigating those offenses lies with the DEA and not the FBI. Defendants argue that the FBI does not have jurisdiction over drug investigations and therefore the wiretap order was invalid since it authorized the FBI to conduct drug-related surveillance.

The Government argues that neither the language of the statute nor the legislative history support the Defendants' contention that the Act restricted the FBI's wiretap authority to only those offenses which are within the exclusive jurisdiction of the FBI. First, it should be noted that among the offenses to be investigated by the Order (Defendant's Exhibit No. 4 and amended Order, Defendant's Exhibit No. 5) is RICO, which Defendants do not argue is outside the FBI's jurisdiction.

The basic offenses involved a violation of 18 U.S.C. §§ 1961 and 1962 (RICO) which clearly entail a series of drug-related crimes. *See United States v. Phillips,* 664 F.2d 971 (5th Cir.1981). Moreover, the RICO allegation in this investigation was not limited to strictly drug-related offenses. It also allegedly involved bribery of public officials, murder, stolen car engines and conspiracy to commit murders, each constituting a separate violation of Florida Statutes. (Defendant's Exhibits Nos. 2 & 3). The investigation of these offenses provided a jurisdictional basis within 28 U.S.C. §501, *et seq.* and 28 C.F.R. §0.85.

A review of the legislative history to §2516(1) supports a "plain meaning" interpretation as to the responsibilities envisioned for the FBI in the investigation of such offenses. The Senate Judiciary Committee Report, S.Rep. No. 1097, 90th Cong., 2nd Sess. 97 (1968), U.S.Code Cong. & Admin. News 1966, pp. 2112, 2186 explains §2516(1) as follows:

> The order of authorization may permit the Federal Bureau of Investigation or the Federal agency having responsibility for the investigation of the offense involved to intercept the wire or oral communication. The Department of Justice under the leadership of the Attorney General must be the central focal point of any drive against organized crime, particularly in the collection, analysis, and dissemination of information. It is appropriate that no limitation be placed on the investigations in which the investigative arm of the Department may participate. Organized crime has not limited itself to the commission of any particular offense. No limitation should be placed on the Department of Justice.

This passage speaks of possible judicial authorization of interceptions by "the Federal Bureau of Investigation or the Federal agency having responsibility for the investigation of the offense. . . ." It does not indicate that the FBI must have general investigative responsibility for a given offense before it may be authorized under §2516(1) to participate in an interception directed at such an offense.

[4] Section 2516 and the legislative history demonstrate that it was not necessary for the FBI to have specific investigative responsibilities for specific offenses before it could participate in court-approved interceptions directed

at those offenses involved herein. The Defendant's argument does not find support in either the statute or the history of the Act.

IV. MARIJUANA-RELATED DRUG OFFENSES MAY BE PREDICATE RACKETEERING ACTS UNDER RICO

[5] Defendant candidly concedes (p. 1060) that decisions in this circuit have found marijuana-related drug offenses to fall within RICO, 18 U.S.C. §1961(1)(D) ("any offense involving . . . the felonious . . . importation . . . or otherwise dealing in narcotics or other dangerous drugs . . .") *See, e.g., United States v. Phillips*, 664 F.2d 971, 1039-40 (5th Cir.1981) ("Marijuana may be the subject matter of a RICO charge.")

Decisions in this circuit have held that marijuana-related drug offenses fall within RICO. *United States v. Phillips, supra.* While Defendant goes on to detail the basis for his contention that such decisions are in error, this Court is nevertheless bound by them until an *en banc* Eleventh Circuit holds otherwise. *See Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

V. PROBABLE CAUSE FOR THE OCTOBER 20, 1980 ORDER

1. *Sufficiency of probable cause in the Affidavit itself.*

This subsection will treat Defendant's attack upon the sufficiency of the affidavit to establish probable cause within its four corners; except that there is excluded, at this point, all matters relating to the sufficiency of missing page 21C and its context within the affidavit and under *Franks v. Delaware, infra.* This latter exception will be discussed later in this Opinion.

Under *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684-2685, 57 L.Ed.2d 667 (1978), there is a presumption of validity with respect to the affidavit supporting a search warrant or court order for electronic surveillance. To mandate an evidentiary hearing, the challenger's attack must be supported by more than conclusory allegations, and must be supported by more than a mere desire to cross-examine. A defendant seeking an evidentiary hearing on the probable cause shown by affidavits presented to the court must make "a substantial preliminary showing that the *statements* in the *affidavits* concerning facts material to the finding of probable cause are *deliberately false* or *made with reckless disregard for the truth." United States v. Licavoli*, 604 F.2d 613, 621 (9th Cir.1979), *cert denied*, 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787. The allegations of deliberate falsehood or reckless disregard for the truth must be accompanied by an offer of proof which points out specifically the portion of the warrant affidavit that is claimed to be false and should be accompanied by a statement of supporting reasons. *Franks, supra.* Affidavits or sworn or otherwise reliable statements of witnesses should be furnished or their absence satisfactorily explained—allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted by *Franks* is only that of the affiant, not of any non-governmental informant. And, finally, if the above requirements are met and if when material that is the subject of the alleged falsity or reckless disregard is set to one side there remains sufficient content in the application to support a finding of probable cause, no hearing is required. *See also, United States v. Jeffers*, 621 F.2d 221, 227 (5th Cir.1980).

Here, no basis for an evidentiary hearing was established and, in fact, no evidentiary hearing was requested as to the sufficiency of probable cause within the boundaries of the affidavit, *except* as to the attack founded upon missing page 21C.

[6, 7] The same probable cause standard which exists for search warrants is applicable to wiretaps: probable cause exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense is being

committed, has been committed or is about to be committed. 18 U.S.C. §2518; *Berger v. New York*, 388 U.S. 41, 55, 87 S.Ct. 1873, 1881, 18 L.Ed.2d 1040 (1967). There need only be a probability of criminal activity rather than a *prima facie* showing. In issuing the order the judge must exercise his own judgment, gleaned from a common-sense reading of the entire affidavit, as to whether the facts alleged constitute probable cause. When the judge or magistrate acts in this manner, his determination as to probable cause is conclusive in the absence of arbitrariness—*i.e.*, a judge's determination of probable cause should be accorded great deference by reviewing courts as long as he performed his independent function and did not merely serve as a rubber stamp for the police. *Bastida v. Henderson*, 487 F.2d 860, 863 (5th Cir.1973); *United States v. Hyde*, 574 F.2d 856, 862 (5th Cir.1978); *United States v. Marcello*, 508 F.Supp. 586, 602-603 (E.D.La. 1981).

[8] However, when, as here, much of the information in the affidavit comes from confidential informants, the magistrate's or judge's search must be guided by and measured against the standards set forth in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), as interpreted by the Fifth Circuit in *United States v. Squella-Avendano*, 447 F.2d 575 (5th Cir.), *cert. denied*, 404 U.S. 985, 92 S.Ct. 450, 30 L.Ed.2d 369 (1971). *Aguilar* requires that the affidavit set forth: (1) the underlying circumstances from which the informant concluded that criminal activity was afoot and, (2) the underlying circumstances from which the affiant concluded that the informant was credible or the information reliable.

[9] The first prong of the *Aguilar* test concerning reliability can be established if the informant's past reliability is known. This enables the court to judge the reliability of the current information already obtained. If information from an informant produces fines, savings, recoveries and

arrests, they will be attributed to the source as his past record. Thereafter, law enforcement officers can be fairly certain they will have future information from a source with an already proven record of accomplishment. In the instant case, both sources #1 and #2 contained in the affidavit have built a track record of reliable information which culminated in numerous law enforcement statistics. (¶¶ 27, 28.) Based on their past records, it was possible for Judge Spellman to estimate that their reliability would be no less in this case.

The second prong of the *Aguilar* test, namely, whether an informant's tip contains the underlying circumstances from which he arrived at his information, is equally important to establishing probable cause. The affidavit in support of the order delves into great detail as to how source #1 came into possession of his information. (¶¶ 29-36.) It is replete with instances of personal knowledge including eyewitness accounts of criminal wrongdoing by certain Defendants. (¶¶ 34-37). Other inputs by source #1 as to underlying circumstances relate personal contacts with Defendants in which they admit criminal conduct, such as when one of the Defendants advised source #1 of the details as to how offload personnel are paid for their services. (¶33.) Moreover, source #2 also has personal knowledge of the information contained in the affidavit. Any observances which were less than actual criminal conduct on the part of the Defendants were minimal. Even those instances are bottomed on occasions when defendants told the source about their narcotics activity or showed the source evidence of narcotics activity (see ¶74, where source #2 was shown from 3 to 4 million dollars by William Joseph Harvey and told it was from his narcotics transaction).

In *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), the Supreme Court held that the *Aguilar* test of reliability could be enhanced by law enforcement corroboration of limited aspects of the informant's report through the use of independent sources. *See also United States v. Weinrich*, 586 F.2d 481 (5th Cir.

1978), *cert. denied*, 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 (1979). That this very tool was employed on numerous occasions is evidenced by the instant affidavit which indicates many surveillances by the FBI and attempts at corroboration of source information through independent investigation. Such examples of independent evaluators taken by themselves do not purport to suggest criminal wrongdoing, but, when added to source information, have the corroborative effect of supporting that information. *Spinelli, supra*, 393 U.S. at 418, 89 S.Ct. at 590; *United States v. Hirschhorn*, 649 F.2d 360 (5th Cir.1981); *United States v. Escandar*, 319 F.Supp. 295, 304 (S.D.Fla. 1970). In most cases it is the *detail* provided by the information in combination with the corroboration by independent investigation that satisfies the court's concern with credibility and reliability. *United States v. Cummings*, 507 F.2d 324 (8th Cir.1974); *United States v. Sellers*, 483 F.2d 37 (5th Cir.1973), *cert. denied* 417 U.S. 908, 94 S.Ct. 2604, 41 L.Ed.2d 212 (1974). Both sources #1 and #2 had furnished information to the FBI over a protracted period of time which, when taken by itself, displayed intimate detail that could come only from persons who were integrally situated within the circle of Defendant's activities. This information, when combined with the FBI's independent corroboration of much of the information through verification of non-incriminating facts, would lead a man of reasonable prudence to believe that an offense has been committed based upon the facts and circumstances contained in the affidavit. *See Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). Defendant Sikes attempts to discredit the affidavit by taking issue with isolated instances within the probable cause summary. His allegation that paragraphs 20, 21 and 23 are not specific enough is unwarranted, however, as those items are merely part of the "BACKGROUND" section. Defendant Harvey's attacks on probable cause take place in the statement of facts where certain items are branded as nebulous and other substantial items are simply glossed over. In fact, the only specific attack by either Harvey or

Sikes' motion is on paragraph 74c where source #2 heard several people in a bar talking about offloads. Sikes, however, omits the specificity contained in the paragraph which describes the amount of marijuana, the two locations, the three individuals in charge, and the corroborative source information that Harvey had "a business deal in Miami." (¶74.) In any event, source #2 as well as source #1 and the "concerned citizen" each provide specific, detailed, corroborated and reliable information throughout the affidavit. The description of each source's reliability (see ¶¶ 27-28) provides a textbook example of vouching for an informational source.

This is in strong contrast with the case of *United States v. Hyde*, 574 F.2d 856 (5th Cir. 1978), wherein the court upheld an affidavit in which the sole verification of the confidential informants was that they were "believed to be reliable." It also is clear, from a thorough reading of the affidavit, that the source information comes not from "double hearsay", as Sikes contends, but in the form of first person observations of, and conversations with, the principal subjects. The affidavit is replete with direct evidence supplied not only by the unnamed witness but also by such named individuals as Cheryl Campbell, Demetria Leiman, Robin Sorrentino, Janet Harris, Michael Sorrentino, Frank Wilt and Jerry Siciliani. As the Fifth Circuit has stated in assessing defense attempts to scrutizine a surveillance affidavit:

> We must also be mindful that probable cause is the sum total of layers of information and the synthesis of what police have heard, what they know, and what they observed as trained officers. We weigh not individual layers, but the laminated total.

United States v. Weinrich, supra [586 F.2d 481] at 490; quoting *United States v. Edwards*, 577 F.2d 883, 895 (5th Cir.1978) (en banc). Even when no particular source is found to be reliable, the fact that a number of informants come forward will supply probable cause. *See United States v. Hyde, supra*, 574 F.2d at 863. It is also clear that an individual who is a bystander or victim-eyewitness to criminal activity does not have to meet the *Aguilar-Spinelli* requirements. *United States v. Cifarelli*, 589 F.2d 180 (5th Cir.1979). The volume of reliable information within the 43-page affidavit of Agent Copus simply cannot be overcome by the Defendants' arguments. It is adequate in every sense to meet the tests and requirements necessary to support the electronic surveillance orders, with or without missing page 21C.

2. *Scope of RICO.*

[10] Defendant Harvey argues that to warrant the surveillance under RICO the Government had to show that each named subject agreed personally to commit two or more predicate offenses and that an enterprise existed which was composed of a group of persons associated together for the common purpose of engaging in a course of conduct. Harvey asserts that there has not been the requisite showing in the affidavits that the persons to be the subject of the electronic surveillance agreed to commit personally two predicate offenses. However, the Government need not prove a *prima facie* case of RICO conspiracy in the application but need only show the probable cause standard of probability that there was, is, or will be a RICO violation. Similarly, if applied to Harvey's assertion that the Government did not show the existence of an enterprise, here again, the Government is not required to prove that such an enterprise existed, rather, the Government need establish only that there was probable cause to believe that RICO violations existed.

A warrant will not be invalidated by interpreting an affidavit in a hypertechnical sense inasmuch as the affidavit should be viewed in a common sense manner. Considering the affidavit in its entirety, there was probable cause to believe that the persons to be electronically surveilled were part of an enterprise which was engaging in the commission of the predicate offenses and also probable cause to believe that Harvey had agreed to participate in the enterprise through commission of two or more predicate offenses.

Other Defendants argue that there was an insufficient showing of probable cause as to that particular defendant. Although §2518(1)(b) requires inclusion in the application of the identity of persons, if known, whose communications are to be intercepted, this provision is interpreted to place a limit on the Government's right to obtain a wiretap and information about someone whom they knew in advance was committing the crimes charged and would probably be intercepted. It seeks to prevent the Government from failing to disclose the names of individuals who would probably be intercepted. Defendants argue that the affidavit must set forth sufficient facts for the issuing judge to conclude that there is probable cause to believe that each person named as a person whose conversations would probably by intercepted committed the offenses. This argument was rejected in *United States v. Martin*, 599 F.2d 880, 884-85 (9th Cir.), *cert. denied*, 441 U.S. 962, 99 S.Ct. 2408, 60 L.Ed.2d 1067 (1979), wherein the court rejected this restrictive approach by holding that an order can issue upon a probable cause showing with respect to *an* individual (here, Harvey), but the staute does not require a similar showing as to each person named in the application.

3. *Continuation of future conversations about past bribes, homicides, etc.*

Defendant Harvey argues that there was no showing in the affidavit that there would be future conversations in the Delray Towing office about past bribes or homicides, but rather only a showing that there may be future conversations about marijuana ventures. In addition to the narcotics offenses, the affidavit names other offenses such as murder, bribery, the corruption of a Coast Guard officer and stolen race car engines. The offenses are part and parcel of Harvey's criminal enterprise, the foundation of which was drug smuggling. The Defendant's contention that the Goverment's proof was only that such events had taken place in the past and would not provide future evidence is a distinction without a difference. Probable cause exists where the affiant's evidence would support a reasonable belief that an offense has been or is being committed. *United States v. Flynn*, 664 F.2d 1296, 1304 (5th Cir.1982). The affidavit, taken in its entirety, shows a criminal enterprise that committed crimes in the past and would do so in the future. It is inherent in such an enterprise that other crimes would be necessary and plans to commit them as well as measures to cover them up would be forthcoming. Courts will not invalidate a warrant by interpreting an affidavit in a hypertechnical, rather than common-sense manner. *See Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). That such conversations would occur in the office of William Joseph Harvey at Delray Towing is amply demonstrated throughout the affidavit. Source #2, (¶¶ 62, 63, 64, 66, 68 and 74B), Cheryl Campbell (¶75a), Demetria Leiman through Arthur Sakell (¶76), and Janet Harris through John Harris (¶124), each described the office as the meeting place for Harvey's criminal activity discussions. That fact was reinforced by FBI surveillance and the many details provided by Source #2. Evidence thus collected must be seen and weighed as understood by those versed in the field of law enforcement. *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

This probable cause attack is without merit.

4. *Staleness of the probable cause.*

[11] Defendant Harvey next argues that the initial probable cause, if it existed, became stale during the first 30-day period of the electronic surveillance because the first three 5-day progress reports did not show any progress. The electonic surveillance was in place on October 24, 1980. The first report on October 29, the second report on November 4, and the third report on November 11, 1980 (at 5-day intervals), each showed no significant conversations.

However, the progress report of November 20, showed significant conversations, commencing November 18, 1980.

Harvey claims that even if there was initial probable cause, it became stale since no relevant conversations were intercepted until November 18, 1980. Section 2518(6) provides that a judge *may* require progress reports to be made. *United States v. Iannelli*, 477 F.2d 999, 1002 (3d Cir.1973), *aff'd* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), held that the sufficiency of progress reports was a matter for the supervising judge and his discretion to permit the continuation of the surveillance when reports are sketchy, must be viewed in light of the fact that there is no requirement for such reports by the statute. Also, the activities in which Harvey was alleged to be engaged were part of an ongoing narcotics operation, not merely a one-time incident. Therefore, since the very conduct which the surveillance seeks to disclose is of a protracted or continuing nature, the time element is of less significance. *See United States v. Weinrich, supra; United States v. Hyde*, 574 F.2d 856, 865 (5th Cir.1978); *United States v. Tucker*, 638 F.2d 1292, 1299 (5th Cir.), *cert. denied*, 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981).

The facts of this case indicate an ongoing narcotics conspiracy. Aside from speculation or strong suspicion on the part of agents from the FBI, the evidence in the affidavit shows a conspiracy dating back to May, 1979 (¶¶ 39-43), and continuing through September 23, 1980. (¶74C.) Actually, the last information was the arrest of Robert Gainer Jernigan and the departure of William Joseph Harvey which was learned of on October 14, 1980. The initial wire interception order was forwarded to Judge Spellman October 17, 1980, and signed October 20, 1980.

In *United States v. Weinrich, supra*, the court stated the basic rule in determing staleness:

> In general, the basic criterion as to the duration of probable cause is the inherent nature of the crime

> . . . [w]here an affidavit recites a mere isolated violation then it is not unreasonable to believe, that probable cause quickly dwindles with the passage of time. *On the other hand, if an affidavit recites activity indicating protracted or continuous conduct, time is of less significance.* (emphasis supplied).

586 F.2d at 491. This reasoning was followed by the Second Circuit in a similar case, *United States v. Martino*, 664 F.2d 860 (1981); *see also, Bastida v. Henderson*, 487 F.2d 860, 864 (5th Cir.1973).

Probable cause is not determined by a ritualistc counting of the number of days since the last information and the warrant's issuance. *United States v. Kirk*, 534 F.2d 1262, 1274 (8th Cir.1976), *cert. denied*, 433 U.S. 907, 97 S.Ct. 2971, 53 L.Ed.2d 1091 (1977). Each case must be determined on its own facts. *United States v Martinico, supra; United States v. Diecidue*, 603 F.2d 535, 560 (5th Cir. 1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980). It must be noted, however, that the number of days in the instant case (27) is comfortably within the time factors courts have mentioned in determining staleness. [See *Hyde, supra*, 20-46 days; *Weinrich, supra*, 20 days; *United States v. Barfield*, 507 F.2d 53 (5th Cir.), *cert. denied*, 421 U.S. 950, 95 S.Ct. 1684, 44 L.Ed.2d 105 (1975), 40 days; *Martino, supra*, 22 days.] This holding applies even in the absence of the instant added factor of protracted and continuous criminal conduct, a factor which renders time of less significance. *Bastida v. Henderson*, 487 F.2d 860, 864 (5th Cir.1973).

The Fifth Circuit, in *United States v. Hyde*, 574 F.2d 856, 865 (1978), considered the above doctrine in relation to a wiretap application used in an investigation of ongoing narcotics trafficking:

> The upshot of this rule in practical application has been to allow a fairly long period of time to elapse between information and search warrant in cases where the

> evidence clearly shows a longstanding, ongoing pattern of criminal activity. This result is even more defensible in wiretap cases than in ordinary search warrant cases, since no tangible objects which can be quickly carried off are sought.

The court then had no trouble finding that, in a conspiracy that had lasted over two years, information that was less than two months old was not stale.

There is no merit to the argument with regard to staleness.

5. *Necessity showing for the order was inadequate (use of alternative investigative techniques).*

[12] Harvey alleges that the statements of FBI Agent Copus on the need for interception in ¶¶ 130-144 do not meet the statutory requirements of §2518(3), that less intrusive/normal investigative techniques have failed, probably would fail, or are too dangerous. Harvey alleges that Copus was not an expert in drug investigations so his statements cannot be viewed as expert testimony on the subject and that the reasons given are inadequate: informants are afraid and unwilling to testify; the defendants have evaded detection and surveillance; difficulty of conducting physical surveillance; not able to place an agent in the operation; grand jury immunity techniques would be unfruitful; and a search warrant would be ineffective.

[13, 14] The purpose of §2518(3) is to inform the issuing judge of the difficulties involved in the use of commonplace techniques. *United States v. Robertson*, 504 F.2d 289 (5th Cir.1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1568, 43 L.Ed 778 (1975). The more traditional techniques need not be exhausted if they are impractical or costly and inconvenient. *Id.* It is also true that the determination that other investigative techniques will not succeed may not be based upon affidavits that include only bare conclusory statements. *United States v. Martinez*, 588 F.2d 1227, 1231 (9th Cir.1978).

The affidavit clearly meets the tests set out in the statute and case law. Agent Copus is an FBI agent who has been assigned for the two previous years to other narcotics investigations. Additionally, the affidavit is not merely conclusory but states the reasons why traditional methods have failed and would fail.

There is a sufficient basis for the Order's conclusion that the traditional methods would not be successful, and since the government's burden of establishing compliance with this section is not great and considerable discretion rests with the issuing judge in deciding whether other investigative techniques might be successfully employed, there has been an adequate showing by the government that other methods have failed or reasonably appear to be unlikely to succeed if tried or would be too dangerous. *See United States v. Landmesser*, 553 F.2d 17, 20 (6th Cir.), *cert. denied*, 434 U.S. 855, 98 S.Ct. 174, 54 L.Ed.2d 126 (1977); *United States v. Anderson*, 542 F.2d 428, 431 (7th Cir.1976).

[15] As the Fifth Circuit has pointed out, §2518(1)(c) and (3)(c) must be read in a common sense fashion. They are "simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. De La Fuente*, 548 F.2d 528, 537-38 (5th Cir.), *cert. denied*, 431 U.S. 932, 97 S.Ct. 2640, 53 L.Ed.2d 249 (1977), *quoting United States v. Kahn*, 415 U.S. 143, 153 n. 12, 94 S.Ct. 977, 983 n. 12, 39 L.Ed.2d 225 (1974). The statute does not require that all possible techniques be tried before a wiretap may be authorized. *See United States v. Martino*, 664 F.2d at 868, and cases cited therein. Rather, its purpose is simply to inform the issuing judge of the difficulties involved in the use of conventional techniques. *United States v. Pacheco*, 489 F.2d 554 (5th Cir. 1974), *cert. denied*, 421 U.S. 909, 95 S.Ct. 1558, 43 L.Ed.2d 774 (1975). The provision contemplates that the showing be tested in practical and common sense fashion. S.Rep. No. 1097, 90th Cong., 2d Sess., 100 U.S. Code Cong. and Admin. News (1968), pp. 2112, 3290; *United States*

v. Robertson, supra. The Fifth Circuit also has stated in *United States v. McCoy,* 539 F.2d 1050 (5th Cir.1976), *cert. denied,* 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977), that in order to uphold the wiretap order the affidavit need only supply a "factual predicate" adequate to support the judge's implicit finding that investigative procedures appear unlikely to succeed.

[16] Both Sikes and Harvey have filed motions which state that there was insufficient necessity to utilize electronic surveillance. Both fail to supply a *reasonable* alternative upon which the government could have proceeded. An item by item breakdown of the Defendant's argument, in concert with the respective responses by the Government, reveals a lawful basis for the surveillance pursuant to §2518(1)(c) and (3)(c). As numerous courts have stated, it is a difficult proposition to be very specific when one endeavors to prove a negative such as the Defendants suggest. Courts will not set unduly burdensome standards on the Government's demonstration that no reasonable alternative existed. *See United States v. Steinberg,* 525 F.2d 1126 (2d. Cir.1975), *cert. denied,* 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976). Considerable discretion rests with the issuing judge in deciding whether other investigative methods might have been successfully employed. *United States v. Landmesser,* 533 F.2d 17 (6th Cir.), *cert denied,* 434 U.S. 855, 98 S.Ct. 174, 54 L.Ed.2d 126 (1977); *United States v. Smith,* 519 F.2d 516 (9th Cir.1975); *United States v. Daly,* 535 F.2d 434 (8th Cir.1976). Also, as stated in *United States v. Anderson,* 542 F.2d 428, 431 (7th Cir.1976): "the government's burden of establishing its compliance with [subsection 2518(1)(c)] is not great." *See also, United States v. Askins,* 351 F.Supp. 408, 414 (D.Md.1972).

Defendant Harvey alleges that the qualifications of FBI Agent Copus in the area of drug-related investigations somehow render his evaluation of alternative procedures insufficient. His allegation that Copus lacks the expert abilities necessary in this case ignores the affidavit which states Copus' qualifications to investigate RICO violations and apply for the instant order under 18 U.S.C. §2510(7). Further, the affidavit documents Copus' two years of experience in the area of complex narcotics importation and distribution conspiracies. (¶¶ 1-2.) Harvey's allegation concerning Copus' lack of drug related training does not stand up in light of the affidavit and the further explanation that Copus was stationed at the Drug Enforcement Agency for two years working on solely drug-related offenses. Additionally, the Defendant cites no legal basis for his theory that an affidavit by an individual with even *no* training in the drug-related field (assuming this was a totally drug-related case) would render an otherwise proper affidavit insufficient.

Normal investigative techniques have been amply demonstrated by the Government to be inadequate for the circumstances which necessitated and gave probable cause for issuance of the electronic surveillance here.

VI. SEALING REQUIREMENTS

[17] Defendants Harvey, Sikes and co-defendants contend that the sealing requirements of §2518(8) were not fulfilled in that no directions were contained in the order as to the care, custody or sealing of tapes and because the original intercepted tapes from the October 20, 1980 initial 30-day period were not sealed until January 23, 1981. Some defendants also maintain that they did not receive an inventory following the termination of the wiretaps.

Section 2518(8) provides that "immediately upon the expiration of the period of the order, or extensions thereof, such recordings should be made available to the judge issuing such order and sealed under his direction. Custody of the recordings shall be wherever the judge orders." Here, the tapes were sealed on January 23, 1981, three (3) days after the termination of the last intercept order (Defendant's Exhibits 59(b) and 42). Case law clearly holds that the tapes do not have to be sealed until the end of the extension orders, i.e., at the termination of the entire surveillance. *United States v. Scafidi*, 564 F.2d 633, 641 (2d Cir. 1976), *cert. denied*, 436 U.S. 903, 98 S.Ct. 2231, 56 L.Ed.2d 401 (1978); *United States v. Vazquez*, 605 F.2d 1269, 1275-76 (2d Cir.), *cert. denied*, 444 U.S. 981, 100 S.Ct. 484, 62 L.Ed.2d 408 (1979). A delay of three (3) days after termination is reasonable and acceptable under the statute. *United States v. Sklaroff*, 506 F.2d 837, 840 (5th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 142, 46 L.Ed.2d 105 (1975) (delay of fourteen (14) days with no showing of prejudice to the defendants).

Defendants also contend that the initial authorization order must specify the procedures for sealing, care and custody of the tapes. The Act does not so state. Such a procedure may be prudent but there is no requirement that if be followed or included. *United States v. Gigante*, 538 F.2d 502, 507 (2d Cir.1976). The Government contends, and there appears nothing to contradict it, that the tapes were preserved and maintained in a manner equivalent to that in *United States v. Abraham*, 41 F.2d 624 (6th Cir. 1976). The tapes were locked in an FBI evidence vault until January 23, 1981, when they were sealed in the presence of the Honorable Eugene P. Spellman (Defendant's Exhibit 58-B). The propriety of the sealing of the tapes was demonstrated in open court on June 30, 1982, when, after notice to all Defendants, two of the five boxes of the tapes were opened. All seals which bore the signature of Judge Spellman were intact. This complies with the standard set forth in §2518(8). The Congressional purposes in the sealing requirements were to safeguard recordings from editing or alteration and to maintain the confidentiality of the recordings. *United States v. Mendoza*, 574 F.2d 1373, 1376-77 (5th Cir.), *cert. denied*, 439 U.S. 988, 99 S.Ct. 584, 58 L.Ed.2d 661 (1978). The real determination therefore is merely whether the tapes were properly and expeditiously sealed, the seals kept intact and the cartons kept in a secure area. There has been no evidence adduced which would taint any of the foregoing requirements nor furnish a basis to suppress for improper sealing requirements.

[18, 19] Time for service of notice of inventory under §2518(8)(d) was extended by court order to July 18, 1981. The statute requires no more than reasonable efforts to reach persons within the Act's inventory group. Suppression is mandated only if the defendants receive notice on the eve of trial and were able to show prejudice resulting from the delay or non-compliance. *United v. Lawson*, 545 F.2d 557, 564 (7 Cir.1975). No prejudice has been shown from failure to receive a notice by any defendant.

According to the government, the deadline for service of inventory was July 18, 1981 (Defendant's Exhibit 45-B). On July 13, 1981, a letter post-marked July 15, 1981, was sent to Joseph William Campbell who raises this issue of failure to furnish notice of inventory at his last known address by certified mail. The letter was returned "unclaimed". (See Exhibit AS submitted by the government with Omnibus Response). Defendant Campbell received notice some time between July 15, 1981, and September 9, 1981 (See Exhibit AT as submitted by government with Omnibus Response.) There is no basis upon which to supress on this ground raised by Campbell.

VII. THE ORDER OF NOVEMBER 20, 1980 WAS ALLEGEDLY INVALID

1. *Carry-Over Objections.*

By reference thereto, the Defendants carry over their objections raised to the October 20, 1980 order relating to the various issues above-discussed. For the reasons previously enumerated the same rulings apply here and the carry-over objections are deemed to be inadequate and insubstantial.

2. *Insufficient probable cause for an extension.*

[20-22] Defendant Harvey claims that there was no showing of a RICO enterprise or an agreement involving Defendant Harvey in the initial 30-day intercept. However, the government can rely on the conversations intercepted

during the initial surveillance to provide probable cause for renewal as well as relying upon the probable cause supplied in the initial application. The issue is whether the progress reports, initial application and application for extension and the affidavits of the initial and extension orders support a finding of probable cause. Since the progress reports during the first 30-day period from November 18, 180 onward indicate conversations dealing with drug transactions, there is an even stronger showing of probable cause to those offenses in support of the first extension order. *United States v. Fury*, 554 F.2d 522 (2d Cir.1977), *cert. denied*, 436 U.S. 931, 98 S.Ct. 2831, 56 L.Ed.2d 776 (1978). Further, it is permissible that a wiretap continue until the government accumulates enough evidence to determine the scope of the conspiracy and the identity of the undividuals involved. *See United States v. McCoy*, 539 F.2d 1050 (5th Cir.1976), *cert. denied*, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977).

3. *Was the district judge without authority to execute an extension order outside his territorial jurisdiciton but operative within his territorial jurisdiction?*

[23] In the instant case, Judge Spellman signed the original surveillance order of October 20, 1980, in Miami, Florida. (Defendant's Exhibit 4.) During the week of November 20, 1980, Judge Spellman, along with other judges of the Southern District of Florida, was in Sarasota, Florida (Middle District of Florida), attending a judicial seminar. FBI Agents Harold Copus and Stephen Conger, along with Assistant U.S. Attorney Stephen Gillman, went to Sarasota where the order of November 20 was presented. Judge Spellman called the Administrative Office and was apprised that he had authority to entertain the extension application in Sarasota, Florida (Defendant's Exhibit 54A), dated November 21, 1980.

When reviewing judicial authority under 18 U.S.C. §2518, an examination of the authority provided to judges/magistrates to issue search warrants under Rule 41, Fed.R. Crim.P., is relevant. The similarity between the wiretap statute and the rule governing search warrants is obvious. Both provisions require that government applications be made to judicial officers and be supported by sworn testimony or affidavits. *Compare*, 18 U.S.C. §2518(1) and Rule 41(c)(1), Fed.R.Crim.P. Likewise, an order or search warrant must meet the constitutional mandates of probable cause and particularity as reflected in *United States v. Donovan*, 429 U.S. 413, 427-28, 97 S.Ct. 658, 667-668, 50 L.Ed.2d 652 (1977); *see also*, 18 U.S.C. §2518(3) and (4) and Rule 41(c), Fed.R.Crim.P. Finally, Congress intended that 18 U.S.C. §2518 be interpreted in light of existing law under Rule 41. S.Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Ad.News 2112, 2189. This analogous treatment of wiretap applications and search warrants provides the basis for allowing federal judges while physically outside their territorial jurisdiction to authorize wiretap extensions which will be executed within the territorial district of the judge.

The specific issue of a federal magistrate's authority to sign a search warrant outside his territorial jurisdiction was addressed in *United States v. Strother*, 578 F.2d 397 (D.C.Cir. 1978). The court noted that "[j]udges have proverbially signed papers or done other acts outside their territorial jurisdiction which have effect—and can only have effect—within those respective jurisdictions." *Id.* at 400. In interpreting the language of Rule 41(a), the court focused its attention not on the physical location of the judge when signing an order but on the judge's authority where the order will be executed. The court stated that ". . . the search warrant can only be operative in the territory in respect of which the issuing officer is clothed with judicial authority. It is not intended, we believe, to require that under all circumstances the physical acts involved in the issuance of a warrant be performed in that territory." *Id.* at 399 (footnote omitted); *See also United States v. Gomez*, 495 F.Supp. 992, 1012 (S.D.N.Y. 1979), *cert. denied*, 450 U.S. 994, 101 S.Ct. 1695, 68 L.Ed.2d 194 (1981).

It is the place of execution, not the location of the judge, which determines the authority of a judge to issue a court order. In the instant case, Judge Spellman authorized, on November 20, 1980, the extension of a surveillance order for an office located within his judicial district, the Southern District of Florida. Moreover, this same district judge had previously authorized the initial order of October 20, 1980.

The Court takes judicial notice that for many years past and including the calendar year 1980, there was in effect a blanket order issued by the Chief Judge of the U.S. Court of Appeals for the Eleventh Circuit (Fifth Circuit) cross-designating each district judge in each district of Florida with judicial authority to sit in every other district in Florida without further order. Here, Judge Spellman did even less by executing an order operative within his own district, although executed in another district of Florida.

Judge Spellman's extension order of November 20, 1980 was valid.

VIII. THE ORDER OF DECEMBER 19, 1980 WAS ALLEGEDLY INVALID

1. *Carry-Over Objections.*

Here again, the Defendants readopt their arguments that the October 20, 1980 order and the November 20 extension were invalid on the basis of grounds previously enumerated. The same rulings of this Court are applied and the order and extension are deemed to be valid.

2. *Prior failure to name Defendant Kay as a target.*

[24] Defendant Kay was not listed in the initial October 20 application and order nor in the November 20 extension application and order as a person known to be committing the offenses for which the surveillance is sought and whose communications are to be intercepted. 18 U.S.C. §2518(1)(a). However, in the December 4, 1980 progress report the Government informed the judge that they had identified Kay as a person whose oral communications may be intercepted. Accordingly, in the December 4 progress report and in the

December 17, 1980 application for an extension of the court's surveillance authorization the Government sought authorization to intercept Kay's conversations. This authorization was subsequently granted by Judge Spellman in his December 19, 1980 order authorizing the continued interception.

The Court finds from the evidence introduced at the suppression hearing that the FBI only identified Kay as a person known to be committing the offense and whose conversations are likely to be intercepted on or about December 2, 1980. The Court also finds that the December 17 extension application and December 19 order continuing interception comported with §2518(1)(a). *United States v. Kahn*, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). Accordingly, there is no basis for suppression for failure to include Defendant Kay in earlier applications and orders as a "target" of the surveillance and the evidence obtained by the surveillance both before and after the December 19, 1980 order can be used against him. *United States v. Hyde*, 574 F.2d 856 (5th Cir.1978); *United States v. Scafidi*, 564 F.2d 633 (2d Cir.1977).

IX. ALLEGED §2517(5) VIOLATION (DISCLOSURE OF TITLE III INTERCEPT AS TO A §848 OFFENSE)

Defendant Harvey argues that because 21 U.S.C. §848 was not specifically cited in the application, incorporated affidavit, and/or the order authorizing the interception, an order granting authorization to disclose the intercepted communications to the grand jury and at trial in relation to a §848 offense was necessary under §2517(5). For the reasons set forth below, the Court concludes that no violation of §2517(5) occurred. Although some of the relevant facts have been set out *supra*, a further brief review of the pertinent facts is helpful.

On October 17, 1980, application was made to United States District Judge Eugene P. Spellman by Assistant U.S. Attorney Stephen B. Gillman for an order authorizing the interception of oral communications of Defendant Harvey and other named individuals, as well as other persons then unknown. Said application was supported by an extensive and detailed affidavit by FBI Agent Harold Copus setting forth probable cause to believe that Defendant Harvey and ten (10) other persons had been and were then operating a large-scale marijuana smuggling enterprise. The situs of the intercepted communications was to be Defendant Harvey's office at Delray Towing Service, Inc. in Delray, Florida. The application stated that the subject communications described therein concerned violations of 21 U.S.C. §841(a)(1) (possession with intent to distribute and distribution of narcotics); 21 U.S.C. §846 (conspiracy to possess with intent to distrtibute and to distribute narcotics); and 18 U.S.C. §1962(c), (d), (conducting and conspiring to conduct the affairs of an enterprise, the activities of which affected interstate and foreign commerce, through a pattern of racketeering activity). The predicate offenses relating to 18 U.S.C. §1962 were enumerated as violations of 21 U.S.C. §841(a)(1) and §846; bribery in violation of Chapter 838 of the Florida Statutes; dealing in narcotics or dangerous drugs in violation of §893.13 of the Florida Statutes; and murder and conspirary to commit murder in violation of §§ 782.04 and 777.04 of the Florida Statutes.

On October 20, 1980, based on the application and accompanying affidavit of Agent Copus, Judge Spellman entered and order authorizing the interception of oral communications of the subject individuals relating to the named offenses, and in particular, concerning narcotics transactions, past and future bribery arrangements, narcotics-related murders, the identities of confederates, the subjects' places of operation, and the full nature and scope of the conspiracy described in the application and affidavit. At five (5) day intervals between October 20, 1980 and November 20, 1980, Judge Spellman received progress reports describing the results of the electronic surveillance. On November 20, 1980, an application was submitted to Judge Spellman for an extension of the October 20, 1980 order. The application sought continued authorization to intercept oral communications concerning the same violations as those enumerated in the October 17 application. The November 20 application was accompanied by a further affidavit of Agent Copus, setting forth additional information relating to the subjects of surveillance and the smuggling operation, including an intercepted conversation between Defendants Harvey, Balough and Campbell. Based on the application, affidavit and progress reports, Judge Spellman entered an order on November 20, 1980, granting the request for extension and authorizing interception of the same type of communications described in the October 20 order, i.e., relating to narcotics transactions, bribery, narcotics-related murders, identities of confederates, places of operation, and the full nature and scope of the conspiracy.

At approximately five (5) day intervals between November 20 and December 19, 1980, Judge Spellman received further progress reports describing the results of the electronic surveillance. On December 19, 1980, an application was submitted to Judge Spellman for a second extension of the October 20 order. The application sought continued authorization to intercept oral communications involving the same offenses as those enumerated in the October 17 application. The December 19 application was accompanied by a further affidavit of Agent Copus, setting forth additional information relating to the subjects of surveillance and the smuggling operation, including the contents of several conversations intercepted during the previous thirty (30) day period. Based on the application, affidavit and progress reports, Judge Spellman entered an order on December 19, 1980, granting the request for extension, and authorizing interception of the same type of communications described in the October 20 and November 20 orders, i.e., relating to narcotics transactions, bribery, narcotics-related murders, identities of confederates, places of operation, and the full nature and scope of the conspiracy. Judge Spellman continued to receive five (5) day progress reports between December

19, 1980 and January 23, 1981. The electronic surveillance, which had commenced October 24, 1980, terminated on January 19, 1981.

The Government subsequently disclosed the contents of the intercepted conversations to a federal grand jury. On February 9, 1982, the grand jury returned an indictment charging Defendant Harvey in Count I with a violation of 21 U.S.C. §848 (continuing criminal narcotics enterprise). Defendant Harvey was also charged with violations of other narcotics-related offenses, including 21 U.S.C. §841(a)(1) and §846. None of the applications, affidavits or orders mentioned above specifically cited 21 U.S.C. §848. Defendant Harvey contends that pursuant to 18 U.S.C. §2517(5)[2], the Government was required to apply for and obtain authorization and/or approval from a judge prior to disclosing the intercepted communications to the grand jury, and prior to using them at trial. The Government sought and obtained no such authorization or approval prior to disclosing the intercepted communications to the grand jury.

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[2] 18 U.S.C. §2517(5) provides:

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom may be disclosed or used as provided in subsections (1) and (3) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Subsection (3) of §2517 provides:

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

The Defendant's contention is based on *United States v. Brodson*, 528 F.2d 214 (7th Cir. 1975) and *United States v. Marion*, 535 F.2d 697 (2d Cir. 1976). In *Brodson* the Seventh Circuit, with Associate Justice Tom C. Clark sitting by designation, affirmed the dismissal of an indictment because the Government failed to get subsequent authorization for disclosure under §2517(5). The defendant in *Brodson* was charged in the indictment with the transmission of wagers and wagering information in interstate commerce in violation of 18 U.S.C. §1084. The evidence for the indictment was obtained through the interception of telephone conversations under an order that only authorized interceptions covering violations of 18 U.S.C. §1955, which prohibits the operation of an illegal gambling business in interstate commerce. The Government filed an application under §2517(5) just prior to trial and eight (8) months after the indictment was returned. The district court denied the application as untimely and dismissed the indictment. On appeal, the Seventh Circuit affirmed the dismissal, rejecting the Government's argument that no authorization was required under §2517(5). The Government had argued that the evidence secured under the §1955 order related to and applied equally to the §1084 prosecution, thus no §2517(5) authorization was necessary. The Seventh Circuit disagreed, finding that the two offenses were separate and distinct, involved dissimilar elements, and required different evidence, even though there might be some overlap because both concerned illegal gambling. *Brodson, supra*, 528 F.2d at 216.

In *Marion, supra*, the other case most heavily relied on by Defendant Harvey, the defendant had been indicted on one count of perjury (Count I) and two counts of obstruction of justice (Counts II and III). The indictment was the result of the defendant's evasive and inconsistent testimony before a federal grand jury. The defendant was questioned before the grand jury (after a grant of immunity) on the basis of two conversations intercepted and recorded pursuant to a state court order authorizing the interceptions. The so-called "lounge order" (authorizing electronic surveillance of a telephone at an establishment called "Jimmy's Lounge") authorized interception of communications related to various state offenses, including grand larceny by extortion, felonious assault, and conspiracy to commit those crimes. The so-called "Delmonico Order" (authorizing electronic surveillance of a telephone at the Delmonico Hotel) authorized interception of communications relating, *inter alia*, to the state offense of possession of dangerous weapons. The federal grand jury in which the defendant testified was investigating possible federal offenses involving interference with interstate commerce by threats or violence, interstate travel and transportation in aid of racketeering, and transportation and transfer of an unregistered firearm through interstate commerce. The Government secured no formal or explicit approval or authorization order under §2517(5) to use the evidence from the state electronic surveillance in the federal grand jury.

As to the evidence derived from the "Lounge Order", the Second Circuit held that when a state supreme court justice entered a renewal order subsequent to the original authorization order, approval under §2517(5) was provided. The Court stated:

> As to the Lounge order and the Marion-Tortora conversation intercepted pursuant thereto, we conclude that §2517(5) approval was provided in the renewal of that order by a Justice of State Supreme Court on March 8, 1972. We find that the affidavit of Assistant District Attorney Goldstock clearly provided the state judge—who had initially authorized the first Lounge wiretap one month before—with notification that possible federal offenses might be implicated. And we presume, as in *United States v. Tortorello*, [480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866, 94 S.Ct. 63, 38

> L.Ed.2d 86 (1973)], that in renewing the tap the judge carefully scrutinized those supporting papers and determined that the statute's requirements had been satisfied. [Footnotes omitted.]

Marion, supra, 535 F.2d at 703. Accordingly, the defendant's conviction for obstruction of justice in Count III was affirmed because the renewal granted by the state judge approved disclosure of evidence relating to the federal offenses. Because the requirement of §2517(5) had been met by the renewal order, the Court found it unnecessary to determine ". . . whether the state crime of grand larceny by extortion and the federal offense of obstructing or delaying interstate commerce by threats or violence could be considered sufficiently similar to obviate any need for §2517 approval." *Id.* at 704 n. 13.

As to the "Delmonico Order", however, there was nothing in the record to indicate that any further applications for approval, renewal or extension were made. *Id.*, at 704 n. 14. The Court held that the federal offense of transportation and transfer of an unregistered firearm through interstate commerce is a separate and distinct offense from the state violation of illegal possession of dangerous weapons, and accordingly §2517(5) authorization was required. *Id.*, at 704 & n. 13. Because no §2517(5) authorization, either explicit or implicit was obtained, the defendant's conviction for perjury (Count I) and the obstruction of justice charge in Count II were reversed.

The Court has carefully read and considered the *Brodson* and *Marion* cases, as well as other authorities on this issue cited by the Defendant, and the authorities cited by the Government. Based thereon, the Court concludes, (1) that no §2517(5) authorization was necessary under the circumstances presented here because §848 was not an offense "other than those specified in the order of authorization or approval" under the terms of §2517(5) and (2) alternatively, the requirement of §2517(5) was met because Judge Spellman gave implicit approval and authorization for the interception of communications relating to violations of §848.

1. *Section 848 was not an offense "other than those specified in the order of authorization or approval" under §2517(5).*

[25] There is no dispute that 21 U.S.C. §848 was not specifically cited in the application for an order authorizing the interception, in the supporting affidavit of Agent Copus, or in the order authorizing the interception itself. As the Defendant argues and the legislative history of §2517 notes, §2517 must be read in light of §2518. S.Report No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S.Code Cong. & Ad. News 2112, 2188 (hereinafter S.Rep. No. 1097). Accordingly, an examination of the requirements of §2518 is appropriate.

Section 2518(1)(b) requires that the application for an order authorizing the interception include, *inter alia*:

> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed. . . .

The legislative history of the Act sheds light on what degree of specificity and particularity was to be required, and the intended purpose of this requirement:

> Subparagraph (b) requires that a full and complete statement of the facts and circumstances relied upon by the applicant be set out, including (i) the details as to *what type of offense* has been, is being, or is about to be committed, ... Each of these requirements reflects the constitutional command of particularization (*Berger v. New York*, 87 S.Ct. 1873 [1883-1884], 388 U.S. 41, 58-60 [18 L.Ed.2d 1040] (1967); *Katz v. United States*, 88 S.Ct. 507 [512-514], 389 U.S. 347, 354-56 [19 L.Ed.2d 576] (1967)). (Emphasis supplied.)

S.Rep. No. 1097, *supra*, at 2189-90. In addition, §2518(4)(c) requires that the order authorizing the interception set forth specifically:

> (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates. . . .[3]

The foregoing provisions were intended to incorporate into the Act the Fourth Amendment's requirement of particularity in authorization for a search, and to prohibit what Justice Clark referred to in *Brodson* as the "electronic equivalent . . . of a 'general search warrant.'" *Brodson,*

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[3] In requiring that the application contain "details as to the particular offense" committed, §2518(1)(b), and that the authorization order contain "a statement of the particular offense to which it relates," §2518(4)(c), the Act on its face does not explicitly require *statutory citations* to each and every possible offense allegedly committed. As noted *supra,* the legislative history characterizes §2518(1)(b) as requiring that the application contain "the details as to *what type of offense* has been, is being, or is about to be committed. . . ." S.Rep. No. 1097, *supra,* at 2189-90. (Emphasis supplied.) Of course, citation of the appropriate statutory sections certainly enhances the particularity of the application and authorization order, and this practice is strongly encouraged and recommended.

The Court also notes §2518(3)(a), which provides that the judge may enter the authorization order upon a determination that:

> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter. . . .

In examining the enumerated offenses in §2516, the Court notes that although most of the offenses are specifically named and cited, the offenses relating to narcotics violations are broadly and generally described:

> (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; . . .

18 U.S.C. §2516(1)(e). Congress thus recognized the closely related nature of the various narcotics offenses. Reference to narcotics related offenses in an application should be examined in the context of this broad Congressional reference to such narcotics offenses.

supra, 528 F.2d at 215; *See U.S. v. Matya*, 541 F.2d 741, 746-47 (8th Cir. 1976), *cert. denied*, 429 U.S. 1091, 97 S.Ct. 1101, 51 L.Ed.2d 536 (1977); *U.S. v. Armocida*, 515 F.2d 29, 37 (3d Cir.), *cert. denied*, 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975); *U.S. v. Tortorello*, 480 F.2d 764, 779-81 (2d Cir.), *cert. denied*, 414 U.S. 866, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973).

The requirement of §2517(5) was intended to prevent circumvention of the particularity and other safeguards of §2518. When communications relating to offenses "other than those specified in the order of authorization or approval" are intercepted, §2517(5) requires that a subsequent application be made to a judge for a determination as to the good faith of the original application prior to disclosure or use of the incidentally intercepted communications. The legislative history indicates the purpose and function of the subsequent application:

> Such subsequent application would include a showing that the original order was lawfully obtained, that it was sought in good faith and not as subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order.

S.Rep. No. 1097, *supra*, at 2189. Thus, the requirement of §2517(5) was intended to prevent the applicant from setting forth certain crimes in the application, when in fact the applicant anticipated intercepting evidence of a different crime for which the prerequisites could not be satisfied. *See, e.g., United States v. Campagnuolo*, 556 F.2d 1209, 1213 (5th Cir.1977); *United States v. Marion, supra*, 535 F.2d at 700-01; *United States v. Vento*, 533 F.2d 838, 855 (8th Cir. 1976).

The Fifth Circuit in *Campagnuolo* examined the meaning of the word "relating" in §2517(5):

> In seeking to determine the proper application of section 2517(5), we are convinced that the phrase "relating to offenses other than those specified in the order of authorization" cannot be mechanistically understood.

> If the term "relating" as used in subsection (5) was construed to include even hypothetical relationships, the exception embodied in subsection (5) would inevitably swallow up subsection (3). Evidence of any federal crime will more than likely "relate" in some way to another federal offense. Evidence of a violation of federal gambling statutes, for example, is often evidence of income tax evasion. A myriad of other examples might be gleaned from the pages of the federal criminal statutes. We believe that the term "relating" must be understood in terms of the protection that subsection (5) was intended to afford. The legislative intent, at least, is apparent. Congress wished to assure that the Government does not secure a wiretap authorization order to investigate one offense as a subterfuge to acquire evidence of a different offense for which the prerequisites to an authorization order are lacking. In light of that objective, the term "relating" is best understood in terms of how the intercepted conversation is used by the Government and the Government's purpose in disclosing it.

556 F.2d at 1214-15.

The Court has carefully examined the affidavit of FBI Agent Harold Copus, and the application for the authorization order which incorporated the affidavit. The Court concludes that said affidavit sets forth probable cause as to each of the elements of an offense of 21 U.S.C. §848. With regard to §848, the application and incorporated affidavit set forth the "details as to the particular offense that has been, is being, or is about to be committed," because a violation of §848 is described with particularity in the affidavit.[4] It is conceded that no statutory citation to §848 is made. When an offense is described with particularity as it was here, however, that fact in no way frustrates the safeguards provided for in the Act. The fact that a §848 violation was described with particularity in the affidavit incorporated in the application establishes that there was no subterfuge. There was probable cause to believe that a §848 violation was occurring. The authorization order of October 20, 1980 stated that there was probable cause to believe that communications would be intercepted concerning:

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[4] The elements of a §848 offense are (1) violation of certain federal narcotics offenses (including 21 U.S.C. §§ 841(a)(1), 846), (2) said violation being part of a continuing series of such violations, (3) undertaken by the violator in concert with five or more other persons, (4) with respect to whom the violator occupies a position of organizer, a supervisory position, or any other position of management, and (5) from which the violator obtains substantial income or resources. *See United States v. Michel*, 588 F.2d

> . . . narcotics transportations, past and future bribery arrangements, information concerning four narcotic related murders, and conversation which will reveal the identities of confederates, the subject's places of operation, and the full nature and scope of the conspiracy involved therein set forth in Agent Copus's affidavit attached as an exhibit to the within application.

Further, that order authorized the interception of communications that:

> . . . reveal the full manner in which the above-mentioned subjects participated in the illegal conduct referred to in Agent Copus's Affidavits and which further reveal the identities of their confederates, their places of operation, and the nature and scope of the conspiracy involved therein. . . .

These are the precise communications that were subsequently

(Footnote 4 Continued)

986, 1000 (5th Cir.), *cert. denied*, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979); *United States v. Johnson*, 575 F.2d 1347 (5th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S.Ct. 1214, 59 L.Ed.2d 454 (1979); *United States v. Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1351, 43 L.Ed.2d 439 (1975). A reading of the affidavit of Agent Copus, incorporated in the application and referred to in the authorization order, reveals that probable cause is established as to each of these elements. The affidavit describes a violation of 21 U.S.C. §848 in all but name.

intercepted. The particularity with which the affidavit incorporated in the application described a violation of §848 belies any notion that the Government sought approval to intercept as to some crimes as a subterfuge to intercept communications relating to a §848 violation. The Government *had* probable cause as to a §848 violation, and it was set forth in the affidavit. To suppress the product of the electronic surveillance or dismiss the indictment because the Government did not include a citation to 21 U.S.C. §848 in the affidavit and/or application would constitute a triumph of form over substance. Because the affidavit incorporated in the application set forth with particularity an alleged violation of §848 and established probable cause with regard thereto, §848, was not an offense "other than those specified in the order of authorization or approval" within the meaning of §2517(5), and the Government was not required to obtain subsequent authorization to disclose the product of the electronic surveillance.[5]

Other courts that have considered this issue have reached an identical conclusion based on similar reasoning. *See United States v. Daly,* 535 F.2d 434, 440 n. 6 (8th Cir. 1976) (dicta); *United States v. Loften,* 518 F.Supp. 839, 843-44 (S.D.N.Y. 1981); *cf. Campagnuolo, supra,* 556 F.2d at 1213-15.

2. *The requirement of §2517(5) was met.*

[26, 27] Where the authorizing judge is presented with applications to extend the surveillance, affidavits in support thereof, and/or progress reports of the interceptions obtained, and upon examination of these materials the judge grants authorization for an extension of the surveillance, this subsequent approval satisfies the requirement of §2517(5) if the supplemental materials disclose to the judge that communications relating to offenses other than those

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[5] The fact that in this case the affidavit incorporated in the application particularly described a violation of 21 U.S.C. §848 and established probable cause relating thereto, distinguishes this case from the *Brodson* and *Marion* cases relied on by the Defendant.

specified in the original application, affidavit and order were intercepted. *United States v. Masciarelli*, 558 F.2d 1064, 1068-69 (2d Cir. 1977); *United States v. Marion, supra*, 535 F.2d at 703; *United States v. Tortorello, supra*, 480 F.2d at 781-83 (interpreting analogous provision of New York wiretap statute); *see United States v. Rizzo*, 492 F.2d 443, 447 (2d Cir. 1974); *United States v. Loften, supra*, 518 F.Supp. at 844. This is so because the judge's approval, when presented with the fact that communications relating to other offenses have been intercepted, constitutes a determination that the original order was lawfully obtained, that it was sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order. *United States v. Masciarelli, supra*, 558 F.2d at 1068; *United States v. Tortorello, supra*, 480 F.2d at 782-83. Thus, as the Second Circuit stated in *Tortorello:*

> Neither the New York statute nor [§2517(5)] requires the issuing judge to announce formally in open court that he has noticed the interception of evidence not covered by the original order and has determined that it was properly obtained. It is enough that notification of the interception of evidence not authorized by the original order be clearly provided in the renewal and amendment application papers. A judge presumably will scrutinize any application and will scrupulously impose the restrictions required by statute.

480 F.2d at 783. The Second Circuit reiterated this view in *Masciarelli:*

> Thus, although a subsequent court authorization or approval issued after express delineation of offenses "other than those specified in the order" unquestionably satisfies §2517(5), it does not represent the only method of compliance. We have adhered to the view that the disclosure in subsequent affidavits to the issuing judge of material facts constituting or clearly relating to other

> offenses satisfies the requirements of §2517(5) under the *"Tortorello* rationale of implicit authorization" . . . . [Citations omitted.]

The facts in the case *sub judice* reveal that Judge Spellman, in granting authorization for two extension after the initial thirty (30) day surveillance period expired, approved the interception of communications relating to a continuing criminal enterprise. Even beyond the initial affidavit and application, the progress reports of November 20, November 25, December 4 and December 11, 1980 (Title III suppression hearing, Defendant's Exhibit Nos. 19, 53A, 55A and 58A) revealed that communications had been intercepted relating to a large marijuana smuggling enterprise which, upon examination, constitutes a continuing criminal enterprise, as previously defined herein. *See* note 4, *supra.* On November 20 and December 19, 1980, applications were presented to Judge Spellman for extensions of the surveillance. These applications were accompanied by further affidavits of Agent Copus which set forth the content of the intercepted communications revealing a large marijuana smuggling enterprise which, upon examination, constitutes a continuing criminal enterprise. On November 20 and December 19, 1980, Judge Spellman granted the requested extensions.

Accordingly, Judge Spellman's authorizations to extend the surveillance, given after notification that communications relating to a large marijuana smuggling enterprise had been intercepted, met the requirements of §2517(5), as held in *Masciarelli, Marion,* and *Tortorell, supra.* The Government had not engaged in a subterfuge search. Thus, there is no basis for suppression or dismissal of the indictment for a §2517(5) violation.[6]

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[6] The Government argues that even if a violation of §2517(5) occurred, neither suppression nor dismissal of the indictment is an appropriate remedy. Because the Court has concluded that no violation of §2517(5) occurred, it is not necessary to address this argument. For discussion of this argument in the context of alleged violations of §2517(5) relating to the state interceptions, *see* Section XII. 6. at 66-67, *infra.*

X. THE EFFECT OF MISSING PAGE 21C

During pretrial discovery proceedings, numerous documents relating to the electronic surveillance were provided to the Defendants by the Government. Included were two supporting affidavits of Agent Copus which accompanied and were incorporated in the two applications for *extension* orders presented to Judge Spellman. (*See* Copus Affidavit of November 20, 1980 (Title III Suppression Hearing, Defendant's Exhibit 13, Government's Exhibit 47); Copus Affidavit of December 19, 1980 (Title III Suppression Hearing, Defendant's Exhibit 24.) Both of those affidavits, at paragraph 7, refer to Agent Copus' *original* affidavit of October 17, 1980, and specifically page 21C, paragraph 74D thereof. However, an examination of the copies of Agent Copus' affidavit of October 17, 1980, provided to the Defendants, revealed that there was no page 21C included in said copies. In May, 1982, the Court ordered that the original affidavit, application and order relating to the electronic surveillance be unsealed for inspection. At said unsealing, the original *55* page Copus affidavit of October 17, 1980, (which had been under seal since October 22, 1980, by order of Judge Spellman) contained no page 21C. Accordingly, page 21C was not included in the original Copus affidavit submitted to Judge Spellman. (See Judge Spellman's Affidavit, docket entry No. 886.)

Based on the absence of page 21C from the original Copus affidavit submitted to Judge Spellman, the Defendants contend that the communications were unlawfully intercepted, and under §2518(10)(a)(i), their contents should be suppressed. In the Defendants' view, the failure to include page 21C in the affidavit submitted to Judge Spellman violated §2518(1)(e) (disclosure of previous applications,) §2516 (approval of application by designated official), and §2518(3)(c) (showing of necessity for electronic surveillance in application). Further, the Defendants claim that the missing page constitutes an intentional and material falsehood by the Government that warrants suppression and that the contents of the missing page, if included in the affidavit submitted to Judge Spellman, would have compelled the conclusion that no probable cause to conduct the electronic surveillance existed.

At a pretiral suppression hearing, the Court heard extensive testimony on this matter offered by the Defendants and the Government, and received voluminous documentary evidence. Having considered the evidence and the extensive argument of counsel the Court hereby makes findings of fact and conclusions of law, set forth fully below.

In early to mid-August, 1980, based on information gained during the course of the FBI investigation, Agent Copus completed a draft of an affidavit to be submitted in support of an application for authorization to conduct electronic surveillance at the office of Delray Towing. In July and again in September, 1980, Agent Copus caused a check to be made of the FBI Electronic Surveillance Indices to determine whether there had been any prior applications for electronic surveillance of the same persons, facilities or places to be included in the application. Both of these checks revealed that there had been no such prior applications. Based thereon, Agent Copus included paragraph 6 in the affidavit, which states:

> 6. I caused a check to be made of the FBI Electronic Surveillance Indices to determine whether an application had been made for an electronic surveillance of any of the same persons, facilities, or places specified in the application accompanying this affidavit. The results of my inquiry were that there were no applications for electronic surveillance of the same persons, facilities, or places specified in the application accompanying this affidavit. The affiant has no knowledge of any other Federal or State agency that has had or has an electronic surveillance for this facility.

Prior to the time of drafting this affidavit, in July, 1980, Agent Copus and Agent Stephen Conger had met with officers of the Boca Raton, Florida, Police Department regarding an investigation by the Boca Raton officers of suspected drug smuggling activities of Robert Jernigan and others. At this meeting, the agents were told that the Boca Raton officers were monitoring a pen register, the subject of which was Robert Gainer Jernigan, although the pen register was not on Jernigan's phone. The agents found the Boca Raton officers generally uncooperative, and they did not learn of the scope of the Boca Raton investigation or the subjects of said investigation in this meeting. In fact, prior to the time the application for authorization for the interception was presented to Judge Spellman, there was little cooperation or communication between the Boca Raton investigators and the federal investigators. The federal agents deliberately refrained from learning the results of the Boca Raton investigation in order to avoid tainting their own investigation, should evidence from the Boca Raton investigation later be held unlawful. The agents were also concerned with allegations that local law enforcement officials had assisted Defendant Harvey in avoiding apprehension and arrest in the past. The agents believed there was a possibility that if they provided details of their investigation to local law enforcement officials, the information might be disclosed to Harvey. In fact, part of the FBI's investigation pertained to possible bribes of public officials by Harvey. Moreover, the federal agents believed that the Boca Raton investigators were incorrect in their belief that Robert Jernigan was the head of the smuggling operation; the federal agents believed that Harvey was in fact the head of the operation.

After Agent Copus completed the first draft of his affidavit, and as additional information was obtained, he would make addendums to the affidavit and insert these addendums at appropriate points. In October, 1980, Robert Jernigan, Jay Jernigan, and two other persons were arrested by Boca Raton police for violation of state narcotics laws. Newspaper articles revealed that there had been a wiretap as part of the investigation that led to those arrests.

Thereupon, on October 14, 1980, Agent Copus called the Boca Raton Police Department to discuss the state wiretap with them. Agent Copus and Agent Conger met with Boca Raton officers that same day and learned that the state wiretap had been on the phone of Robert Jernigan.[7]

Prior to October 14, 1980, the federal agents had no knowledge of the wiretap conducted by the Boca Raton officers. They did not ascertain in this meeting whether Defendant Harvey was in fact intercepted on the state wiretap; it can be inferred that they knew that Harvey might have been intercepted. Neither the agents nor any other federal official was aware of the contents of the state wiretap application during the time period of the federal interceptions, and they therefore did not know that Harvey was named in the state application. The federal investigators did not obtain copies of the state wiretap applications, orders, logs and some transcripts until *after* the federal electronic surveillance at Delray Towing had terminated, and these materials were kept in a separate file and not referred to until after the indictment was returned to avoid any possible taint of the federal investigation.

Also, on October 14, 1980, Agent Copus learned additional information from a source identified as a "concerned citizen." Based on the meeting with the Boca Raton officers and the additional information from the concerned citizen source, Agent Copus drafted page 21C as an addendum to the affidavit. Page 21C reads as follows:

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[7] In the state criminal proceeding, *State of Florida v. Robert Gainer Jernigan, Jay Travis Jernigan, John Dennis Cason, Rudolph Lutz*, Case No. 80-5687-CF, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, the Defendants' Motion to Suppress the communications intercepted by the state wiretap were denied. *See* Order of October 30, 1981, Exhibit "F" to Government's Response to Defendants' Motion to Suppress Wiretap Evidence (docket entry No. 700).

ADDENDUM

74.D On October 14, 1980, SA Harold C. Copus was advised by a concerned citizen that Billy Harvey was at the residence Gary Balough on October 10, 1980, when received a telephone call that he needed to go to his office at Delray Towing and get his records out of his office. Harvey was informed that Gainer Jernigan had been arrested and that an arrest warrant was outstanding for Dennis Cason. Harvey left Balough's house, went to his office where he retrieved some papers and then left town with his wife for an unscheduled vacation.

On October 14, 1980, the same concerned citizen advised that Jernigan had been arrested on state narcotics charges by the Boca Raton Police Department and that an arrest warrant was outstanding for Dennis Cason.

Ed Thornton, Boca Raton Police Department, was contacted on October 14, 1980, by SA Harold C. Copus. Thornton advised that his department had a state Title III on the telephone of Gainer Jernigan and had obtained evidence which led to a complaint and warrant for the arrest of Jernigan for violation of State narcotics charges. Thornton advised that Cason was not arrested and was a fugitive. The concerned citizen also advised on October 14, 1980, that Harvey had sent an airboat into the Everglades to locate Cason and then had Cason taken to a location where he could hide from law enforcement. Thornton also advised on October 14, 1980, that the bond for Jernigan was set at 2½ million dollars, but they expected the bond to be reduced and Jernigan would be released.

Your affiant believes that should Jernigan be released on bond, that he, Cason and Harvey will continue to meet in Harvey's office to discuss their criminal activities.

A copy of page 21C was sent by telefax to FBI headquarters and to the Department of Justice in Washington, D.C. to be considered for authorization to apply for an intercept order. The application, affidavit, etc., were already at the Department of Justice and had been for some weeks. An action memorandum from Philip Wilens, Director of the Office of Enforcement Operations, Criminal Division, to Assistant Attorney General Philip B. Heymann (Title III Suppression Hearing, Defendant's Exhibit 63) dated October 16, 1980, establishes that the Department of Justice received and considered the contents of page 21C. Assistant Attorney General Heymann gave authorization for the application on October 16, 1980 (Title III Suppression Hearing, Defendant's Exhibit 3, Government's Exhibit 40).

On or about October 14, 1980, and prior to October 17, 1980, when the application was submitted to Judge Spellman, Agent Copus and Agent Pedro Rubio met with Ann Vitunac, Chief of the Homocide and Organized Crime Units of the Palm Beach County State Attorney's Office, and Kenneth Selvig, and Assistant State Attorney for Palm Beach County. At this meeting Agents Copus and Rubio ascertained that the Boca Raton investigation was focused on Robert Jernigan, and that the state investigators did not believe that their evidence at that time established probable cause to arrest Harvey. The FBI agents asked the investigators not to pursue investigation of Harvey. The FBI agents did not ask about nor did they receive information as to the contents of the state wiretaps, who had been the targets of that surveillance, and/or who was intercepted on the state wiretaps.

Agent Copus testified that page 21C was placed in the original affidavit submitted to Judge Spellman in support of the application for authorization to conduct the electronic surveillance at Delray Towing. Page 21C was not in the affidavit when the documents were unsealed in May, 1982. The page appeared in copies of the affidavits retained by the agents; it does not appear in copies of the affidavit retained by the U.S. Attorney's Office, from which the discovery materials were provided. There is no evidence that establishes how page 21C came to be missing from the affidavit. Based upon the evidence adduced, the Court finds and concludes that the omission of page 21C from the affidavit was an unintentional omission and not deliberate, it was not the result of a reckless disregard for the truth, and that there was no intent on the part of federal investigators to conceal the content of page 21C in any way from Judge Spellman. Page 21C was submitted in the copies of the affidavit attached to the subsequent affidavits filed to support applications for the extension orders, and thus was presented to Judge Spellman at that time. A progress report submitted to Judge Spellman dated November 4, 1980 (Government's Exhibit O), refers to "the arrests that were effected by the Boca Raton police several weeks ago, as reported previously to the Court." Page 21C had been submitted to and approved by Department of Justice officials in Washington prior to submission of the intial application to Judge Spellman. There was no intent to hide or conceal page 21C; rather, it was inadvertently omitted from the original affidavit submitted to Judge Spellman.

The Defendants assert that the omission of page 21C from the original Copus affidavit violated provisions of Title III and therefore should be suppressed. In addition, the Defendants contend that suppression is warranted because the omission constitutes deliberate falsehood or reckless disregard for the truth as to material facts, and because the contents of page 21C negated probable cause for the interception. These contentions are addressed *seriatim* below.

1. *Alleged violations of Title III.*

[28] Defendants first contend that the omission of page 21C constituted a violation of §2518(1)(e). That section requires that the application contain:

> (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any

> judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application. . . .

Based on the Copus affidavit, the application stated:

> Agent Copus's Affidavit, which is attached hereto and incorporated by reference herein, reflects that a review of the Miami files of the Federal Bureau of Investigation, as well as the files of the FBI Headquarters fail to reflect any previous application for the individuals, phones, and location specified in this application.

Because page 21C contained information regarding the previous state wiretap of which Robert Jernigan was the target, the Defendants contend that the application did not contain "a full and complete statement of the facts concerning all previous applications . . .," and suppression, they argue, is therefore mandated.

The Defendants rely primarily on *United States v. Bellosi*, 501 F.2d 833 (D.C.Cir.1974). In that case, the Government *purposely* did not disclose in its applications the fact that one of the targets thereof had also been a target of an earlier application. The D.C. Circuit affirmed the district court's order suppressing the communications intercepted. In the case *sub judice*, however, the omission was not intentional; rather, it was an inadvertent omission. The Fifth Circuit, in *United States v. Sklaroff*, 552 F.2d 1156, 1160 (5th Cir.1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978), distinguished *Bellosi* on this basis. Here, as in *Sklaroff*, "no inference that [the Government] was trying to hide any previous interceptions is justified." *Id.* at 1160.

Moreover, subsequent cases have more clearly defined the requirement of §2518(1)(e). The application need not reveal a prior interception when the subject for which authorization is sought was not the target of the application seeking the prior interception. *United States v. Sklaroff, supra*, 552 F.2d at 1160; *United States v. Florea*, 541 F.2d 568, 575-76 (6th Cir.1976), *cert. denied*, 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977); *United States v. Kilgore*, 518 F.2d 496, 500 (5th Cir.1975), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 193 (1976). Further, the statute does not require a detailed statement describing the contents of the prior interception. *United States v. Kilgore, supra*, 518 F.2d at 500.

What §2518(1)(e) requires is "a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application . . . involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application." Concededly, the prior state application authorizing the wiretap on Robert Jernigan's phone should have been disclosed to Judge Spellman in the original application and incorporated affidavit as the Government intended but inadvertently failed to do. The issue is whether the Government's *inadvertent* failure to disclose the prior application to Judge Spellman in the original application warrants suppression. As the Supreme Court has held, not every failure to comply with any requirement of Title III renders the interception "unlawful." *United States v. Donovan*, 429 U.S. 413, 433, 97 S.Ct. 658, 671, 50 L.Ed.2d 652 (1977), citing *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) and *United States v. Chavez*, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380 (1974). In *United States v. Abramson*, 553 F.2d 1164, 1168-71 (8th Cir.), *cert. denied*, 433 U.S. 911, 97 S.Ct. 2979, 53 L.Ed.2d 1095 (1977), the Government failed to state in the application that wiretap evidence obtained pursuant to a prior application which was disclosed was suppressed. The court held that the government had failed to comply with §2518(1)(e). However, the court correctly looked to §2518(10)(a), and the Supreme Court's construction of that section in *United States v. Donovan*, 429 U.S. 413, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977), to determine whether suppression was mandated. As in *Donovan* and *Abramson*, the only basis for suppression under §2518(10)(a) applicable to this case is subsection (i), which requires suppression where "the communication was unlawfully intercepted." As the court in *Abramson* noted:

> In *Donovan*, the Supreme Court repeated its earlier holding that suppression is required only for "a 'failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" 97 S.Ct. at 671, *quoting United States v. Giordano*, 416 U.S. 505, 527, 94 S.Ct. 1820 [1832], 40 L.Ed.2d 341 (1974). It repeated also its earlier conclusion that a statutory violation renders an interception unlawful for purposes of §2518(10)(a)(i) only if the requirement involved plays a "substantive role" in the regulatory system, 97 S.Ct. at 67, *citing United States v. Chavez*, 416 U.S. 562, 578, 94 S.Ct. 1849 [1857], 40 L.Ed.2d 380 (1974).

553 F.2d at 1170. In determining whether suppression was warranted, the Supreme Court considered whether the statutory violation vitiated the sufficiency of the factors which the issuing judge must find to be present if the interception is to be authorized. *Donovan, supra*, 429 U.S. at 435-36, 97 S.Ct. at 671-672; *see Abramson, supra*, 553 F.2d at 1170. Those factors are:

> . . . that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception; (iii) the target facilities are being used in connection with specified criminal activity.

Donovan, supra, 429 U.S. at 435, 97 S.Ct. at 671; *Abramson, supra*, 553 F.2d at 1170. The Supreme Court in *Donovan* concluded that the particular violations involved in that case "could hardly invalidate an otherwise lawful judicial authorization." 429 U.S. at 435, 97 S.Ct. at 671. Likewise, in the context of failure to comply with §2518(1)(e) by not disclosing suppression of wiretap evidence obtained pursuant to a previous application, the Eighth Circuit in *Abramson* concluded:

> Viewed against the backdrop supplied by the recent teachings of *United States v. Donovan, supra*, we hold that the failure to disclose the fact of suppression of the 1970 wiretap did not detract from the sufficiency of the enumerated factors necessary to a judge's wiretap authorization and hence was not central or functional in guarding against unwarranted use of wiretapping or electronic surveillance.

553 F.2d at 1170.

Under the particular facts and circumstances presented in this case, the Court concludes that the omission of page 21C containing reference to the prior state wiretap of Robert Jernigan's telephone did not detract from the sufficiency of the enumerated factors necessary for authorization of the interceptions. The fact of the prior state wiretap did not vitiate the showing in paragraphs 131 through 144 of Copus' affidavit that normal investigative techniques had failed or were unlikely to succeed. In fact, this showing was strengthened by other information in page 21C. Although page 21C revealed that a prior state wiretap had been placed on Robert Jernigan's phone, it also revealed that Harvey had taken papers from his office and left on an unscheduled vacation, that Dennis Cason was a fugitive and Harvey had made arrangements for him to hide from law enforcement officials, and that Jernigan had been arrested. The targets would certainly now take even greater precautions to frustrate normal investigative techniques. The FBI agents knew from their meetings with state authorities that the state investigators did not have sufficient evidence to arrest

Harvey. Thus, the showing of necessity for the electronic surveillance was not vitiated by the fact of the prior state wiretap.[8] Nor does the fact that the prior state wiretap vitiate the showings that communications relating to the offense would be intercepted or that the target facility would be used for communications relating to the specified offenses. If anything, the prior state wiretap strengthened the latter two factors, because the targets could be expected to use face-to-face meetings rather than telephone communications to conduct the unlawful enterprise.

Moreover, Judge Spellman was subsequently apprised of the prior state wiretap when the Copus affidavit with page 21C included was presented as part of the application for the two subsequent extensions. It is to be presumed that Judge Spellman "carefully scrutinized those supporting papers and determined that the statute's requirements had been satisfied." *United States v. Masciarelli; supra* 558 F.2d at 1068; *United States v. Marion, supra,* 535 F.2d at 703; *United States v. Tortorello, supra,* 480 F.2d at 783. Under the facts and circumstances presented in this case, the Government's inadvertent failure to include page 21 with the reference to the prior state wiretap in the original affidavit submitted to Judge Spellman did not vitiate the essential factors necessary for the authorization, as set forth above. Moreover, Judge Spellman was subsequently presented with the fact of the prior state wiretap and thereafter approved two extensions of the federal interceptions. Under these circumstances, the interceptions were not "unlawful", and suppression under §2518(1)(a)(i) is not mandated.

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[8] The foregoing conclusion disposes of the contention that the contents of page 21C vitiate the showing of necessity under §2518(3)(c). Although unrelated to the issues created by missing page 21C, Defendant Harvey argues in his Fifth Supplement at pp. 16-17 that the absence of reference in Copus' affidavit to evidence obtained in controlled trash collections as part of the state investigation vitiated the showing of necessity under §2518(3)(c) and rendered the affidavit materially false. This argument is without merit. Even with this evidence, the state investigators had told the FBI agents that the state lacked sufficient evidence to arrest Harvey.

Defendant Harvey argues that page 21C, even had it been presented to Judge Spellman, did not constitute a "full and complete statement of the facts concerning" the previous state wiretap as required by §2518(1)(e), and that suppression is therefore required. Defendant Harvey contends that this is so because page 21C did not identify Harvey as a named party to the state wiretap application. However, the facts as set forth *supra*, establish that the federal investigators did not know that Harvey was named in the state wiretap application until sometime after the federal electronic surveillance had terminated. The Government cannot be required to disclose something its agents do not know. Acceptance of Defendant Harvey's arguments in this regard would in effect impose a duty upon the Government agents to conduct a full investigation to ascertain the details and particulars of all prior interceptions, a proposition neither the Act nor the case law supports. Section 2518(1)(e) requires only that the application contain a "full and complete statement of the facts concerning all previous applications *known to the individual*" making the application (emphasis supplied). That Robert Jernigan had been the subject of a prior state wiretap was all that the agents knew for certain. They also knew that Harvey might have been intercepted, an obvious inference that could be drawn from the nature of the conspiracy revealed by the Copus affidavit. Moreover, the agents did not know for a fact that Harvey's communications had been intercepted on the state wiretap; the state investigators had not told them this, nor did they know of the contents of the state interception at the time they applied to Judge Spellman. The federal agents purposely avoided involvement in the state investigation, out of legitimate concerns regarding possible tainting or compromising of the federal investigation. Under all the facts and circumstances, the information included in page 21C constituted "a full and complete statement of the facts concerning" the prior state wiretap. *See United States v. O'Neill*, 497 F.2d 1020, 1025-26 (6th Cir.1974).

Defendant Harvey further contends that omission of page 21C from the original Copus affidavit submitted to Judge Spellman caused a violation of §2516, because the application approved by Assistant Attorney General Heymann in Washington was a materially different application than that submitted to Judge Spellman. This argument is without merit. Section 2516 was intended to centralize in a publicly responsible official the formulation of law enforcement policy on the use of electronic surveillance techniques, and to interpose the judgment of a Justice Department official as a precondition to a judicial order. S.Rep. No. 1097, *supra*, at 2185; *United States v. Giordano* 416 U.S. 505, 515-16, 94 S.Ct. 1820, 1826-1827, 40 L.Ed.2d 341 (1974). Had the investigatory personnel in this case sought judicial authorization without the approval of the appropriate Justice Department official, or had there been a concealment of material facts from the Department, a different result might be compelled. Here, however, the full and complete application was submitted to and approved by the Justice Department; the inadvertent omission of a page in the affidavit submitted to the judge does not constitute a violation of §2516.

2. *The allegation of intentional omission and the effect of missing page 21C on the showing of probable cause.*

[29] The Defendants argue that the omission of page 21C from the affidavit submitted to Judge Spellman constituted a deliberate falsehood or a reckless disregard for the truth as to material matters, and thus the suppression is compelled. The Defendants also argue that the contents of page 21C vitiate probable cause, and thus invalidate the authorization for the interceptions. For the reasons set forth below, the Court rejects these contentions.

[30] The affidavit is invalid only if it is shown by a preponderance of the evidence (1) that it contains knowing and intentional material misrepresentations, or there has been a reckless disregard for the truth as to material matters, and (2) without the false material, the affidavit is insufficient

to establish probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56, 171, 98 S.Ct. 2674, 2676-2677, 2684, 57 L.Ed.2d 667 (1978); *United States v. Lewis*, 621 F.2d 1382, 1389 (5th Cir.1980), *cert. denied*, 450 U.S. 935, 101 S.Ct. 1400, 67 L.Ed.2d 370 (1981); *United States v. Martin*, 599 F.2d 880, 886 (9th Cir.1979) (in context of Title III); *United States v. Astroff*, 578 F.2d 133 (5th Cir.1978) (*en banc*). Omissions are treated the same as misstatements. *United States v. Martin*, 615 F.2d 318, 327-28 (5th Cir.1980). *Martin* sets forth the test for determining whether suppression should occur where an omission is involved. For suppression to occur it must be shown by a preponderance of the evidence (1) that the omission was in fact made, (2) that it was made intentionally or with reckless disregard for the truth, and if these showings are made, (3) that if the omitted material had been included in the affidavit, the affidavit would be sufficient to establish probable cause. *Martin, supra*, 615 F.2d at 328.

The Defendants have failed to make a sufficient showing by a preponderance of the evidence as to two of the required elements. As discussed *supra*, the Court concludes from the evidence adduced at the suppression hearing that the omission of page 21C was not intentional and was not made with a reckless disregard for the truth. The Court finds that there was no bad faith, intent to deceive or conceal, or reckless disregard for the truth. Rather, the omission of the page was inadvertent and unintentional. The matters referred to in page 21C were subsequently revealed in progress reports to Judge Spellman. The page was included in copies of the affidavit submitted as part of the applications for extension, and it had been sent to Department of Justice officials in Washington. The record reveals no intent to conceal the contents of page 21C. The Defendants have failed to show by a preponderence of the evidence that there was an intentional omission or a reckless disregard for the truth.

The Defendants have also failed to show that had page 21C been included in the affidavit, probable cause would no longer have existed. Although page 21C stated that Harvey had left town on an unscheduled vacation and Jernigan was in jail, it also stated that state investigators expected Jernigan's bond to be reduced and that he would be released. The affidavit taken as a whole established the existence of a large, well-organized, ongoing conspiracy. The fact that Harvey had left town on an unscheduled vacation does not alone vitiate probable cause. Three employees of Delray Towing were named in the affidavit as possible co-conspirators, and they might well have had access to the use of the office in Harvey's absence. After the state arrests and the fact of the state wiretap became public knowledge, it became more likely that the targets would meet at Delray Towing to conduct business face to face. As discussed *supra*, the contents of page 21C did not lessen the showing of necessity at paragraphs 131-144 of the affidavit, since the targets would, after the state arrests, be even more cautious and make even greater attempts to frustrate normal law enforcement techniques. With or without page 21C, the Copus affidavit adequately stated probable cause.

Accordingly, because the Defendants failed to prove an intentional omission or reckless disregard for the truth, and because inclusion of page 21C in the affidavit would not have vitiated the probable cause showing, omission of page 21C does not provide a basis for suppression on those grounds.

XI. MINIMIZATION

[31] The Court heard testimony and received documentary evidence relating to the requirement that the interceptions "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . . . " 18 U.S.C. §2518(5). Having heard, received and considered said evidence, and having heard extensive argument by counsel, the Court hereby makes findings of fact and conclusions of law, as set forth below.

The Copus affidavit stated at paragraph 147 with regard to minimization:

> Monitoring of oral communications in the office of Delray Towing Service, Inc., will immediately be suspended when it is determined through voice identification, surveillance, or the nature of the conversation that none of the principals are participants in the conversation, or, even if they are participants, the conversation is not criminal in nature. To further protect the privacy of those in the office of Delray Towing Service, Inc., no monitoring of the target premises will occur unless a vehicle known to be occupied or driven by one of the principals is observed in proximity to the premises. In addition, the Special Agents of the FBI will make good faith efforts to avoid intercepts of nonpertinent oral communications.

The order and extensions thereof authorizing interception contained the requirement that minimization occur as required by §2518(5). Assistant U.S. Attorney Gillman prepared a detailed set of instructions (Title III Suppression Hearing, Defendant's Exhibit 77, Government's Exhibit 33) which set forth extensive directions to assure that minimization occurred. These instructions and a copy of the authorization order were kept at the listening post, and records kept there indicated the monitoring agents read them. Assistant U.S. Attorney Gillman met with the monitoring agents prior to commencement of the interception and explained the minimization procedures and requirements. This activity was reported to Judge Spellman (Title III Suppression Hearing, Defendant's Exhibit 32, Government's Exhibit 10). Judge Spellman received progress reports approximately every five (5) days, and close judicial supervision over the interceptions occurred. The progress reports, the logs of the interception, and the testimony at the suppression hearing reveal that conversations were in fact minimized.

The Government has the burden of establishing that the minimization requirement was met. *United States v. Rizzo*, 491 F.2d 215, 217 (2d Cir.1974), *cert. denied*, 416 U.S. 990, 94 S.Ct. 2399, 40 L.Ed.2d 769 (1974). Having considered all of the evidence adduced, the Court concludes that the Government has sustained its burden, and that the minimization requirement was met in this case.

[32] Minimization requires an objective assessment of the agents' actions in light of the facts and circumstances of the particular case. *Scott v. United States*, 436 U.S. 128, 139-40, 98 S.Ct. 1717, 1724-1725, 56 L.Ed.2d 168 (1978). The standard is a test of reasonableness based on the facts and circumstances. *United States v. Hyde*, 574 F.2d 856, 869 (5th Cir.1978); *United States v. Daly*, 535 F.2d 434, 441 (8th Cir.1976). Three specific factors are considered in determining reasonableness: (1) the nature and scope of the criminal enterprise under investigation, (2) the Government's reasonable inference of the character of a conversation from the parties to it, and (3) the extent of judicial supervision. *United States v. Hyde, supra*, 535 F.2d at 441. Examination of these factors in the context of the facts presented in this case reveals that the Government complied fully with the minimization requirement. The evidence establishes that the monitoring agents showed a high regard for privacy rights and did all they reasonably could to avoid unnecessary intrusions. *See United States v. Feldman*, 606 F.2d 673, 679 (6th Cir.1979), *cert. denied*, 445 U.S. 961, 100 S.Ct. 1648, 64 L.Ed.2d 236 (1980); *United States v. Quintana*, 508 F.2d 867, 873-76 (7th Cir.1975); *United States v. James*, 494 F.2d 1007, 1018-23 (D.C.Cir.1974), *cert. denied*, 419 U.S. 1020, 95 S.Ct. 495, 42 L.Ed.2d 294 (1974). An examination of the surveillance logs supports the testimony by monitoring agents that they in fact did minimize the conversations overheard, notwithstanding the failure to use any specific word such as "minimization" as a designation in the surveillance logs where records of the communications intercepted were kept. There is nothing in the record of evidence adduced to suggest that the monitoring agents imprudently monitored in a manner contrary to the

congressional intent of §2518(5) or the plain language of that provision in any pattern or to such a degree that would support application of the drastic remedy of suppression.

The Defendants have raised several contentions which they contend show that the minimization requirement was not complied with: inadequate follow-up by Assistant U.S. Attorney Gillman to assure compliance with the instructions: failure to read and sign copies of instructions and the authorization order at the listening post; failure to familiarize monitoring agents with voices of the principals; failure to record all conversations monitored; falsification of progress reports; and inaccurate maintenance of the logs. All of these contentions are either totally unsupported by the evidence adduced at the suppression hearing or were unnecessary under the circumstances to accomplish minimization. The Defendants have particularly urged, based on paragraph 147 of the Copus affidavit, that failure of the agents to monitor only when surveillance of the premises revealed the presence of target individuals compels a finding that minimization did not occur. The affidavit must be considered as a whole, however, and paragraphs 134 and 135 indicate the difficulty in conducting physical surveillance of the premises. Based on all of the facts and circumstances, and based on the evidence adduced, the agents in good faith minimized their monitoring, and the standard of resonableness was met. The contentions of the Defendants that the requirement of minimization was not met and that suppression is required are without merit.

XII. FLORIDA STATE CHAPTER 934 INTERCEPT

Under date of August 5, 1980, the Honorable Tom Johnson, Circuit Judge of the 15th Judicial Circuit, Criminal Division, Palm Beach County, Florida, issued an order for a wiretap under Fla.Stat. §934.07, to intercept communications relating to violations of Florida narcotics laws and marijuana smuggling. A 30-day extension was issued on September 3, 1980, and a second 30-day extension was issued on October 3, 1980.

David J. Bludworth, State Attorney for the 15th Judicial Circuit of Florida, authorized the Chief of Police of Boca Raton Police Department, Boca Raton, Florida, based upon an affidavit of Detective William T. Sims, to apply to the court for the wiretap order. Included among the persons named in the orders were William Joseph Harvey, Robert Gainer Jernigan, Jay Jernigan and John Cason.

Defendants Harvey and Robert G. Jernigan, joined by other "aggrieved" co-defendants, addressed Motions to Suppress the Florida state wiretap evidence. At the extensive pretrial evidentiary hearings conducted on pending pretrial motions, the Court invited any and all parties to present testimony and/or evidence and oral argument for or against the suppression of the Florida state wiretap and the evidence derived therefrom. No party proferred or offered to produce any testimony or evidence attacking the Florida state wiretap and no party argued the merits orally. It was submitted on the memoranda of law and the record of the pretrial hearings, if any, applicable thereto. Therefore, no findings of fact are necessary or required and the matter was considered by the Court on the issues of law presented; except that the issue of disclosure of the Florida state wiretap evidence under 21 U.S.C. §2517(3), (5) is discussed *infra*.

[33] The validity of the state wiretap authorization is to be determined under state law. *United States v. Fury*, 554 F.2d 522, 525 (2d Cir.1977), *cert. denied*, 436 U.S. 931, 98 S.Ct. 2831, 56 L.Ed.2d 776 (1978); *United States v. Manfredi*, 488 F.2d 588, 598 (2d Cir.1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2651, 41 L.Ed.2d 240 (1974). However, the admissibility of the evidence at trial is governed by federal law. *United States v. Nelligan*, 573 F.2d 251, 253 (5th Cir.1978). Chapter 934, Fla.Stat., is in fact almost identical to Title III and if valid under state law the Florida wiretap would be valid and admissible in federal court under federal law. *See State v. Aurilio*, 366 So.2d 71, 74 (4th DCA 1978), *cert. denied*, 376 So.2d 76 (1979). Defendant Harvey concedes that (pg. 54 of Defendant Harvey's Motion/Memorandum in Support of

Suppression) "It takes but a glance to see that the language of the Florida wiretap statute, as a whole and in the relevant section, was taken by the legislature wholesale from the language of Title III." The Court is in accord that fundamentally and basically Chapter 934 is almost identical to Title III.

1. *Probable Cause.*

[34] It should be noted that the attack on probable cause made by the Defendants is not an attack on the affiant's veracity but rather is merely a facial attack on the affidavit. *See Franks v. Delaware, supra.* Defendants Jernigan and Harvey, among others, argue that there was insufficient probable cause in accordance with Fla.Stat. §934.09(3) to issue the order. As in the federal statute, the state statute requires probable cause to believe that an individual is committing, has committed, or is about to commit one of the enumerated offenses; to believe that particular communications concerning that offense will be obtained through the wiretap; and to believe that the facilities from which the communication is to be intercepted are being used in connection with the commission of the suggested offenses. Defendants argue that Detective Sims' affidavit contains conclusory allegations, broad generalizations and speculation, that any of the allegations are unrelated to or insufficient as to Robert Jernigan and that the information in the affidavit is stale.

Contrary to the Defendants' assertions, the conclusions in the affidavit are supported by the underlying facts. Additionally, affiant Sims unquestionably qualifies as an expert in the area of drug investigation. His interpretations as to the significance of items of trash, memos or writings, as well as the connection between the telephone numbers revealed by pen registers, all lend credibility to the affidavit which should be read as a whole, not in isolation as to various bits and pieces. *Rodriguez v. State*, 297 So.2d 15, 17 (Fla.1974). Sims states the underlying circumstances from which most of his observations are made and couples with it his expertise as a drug expert in weighing the evidence.

Defendants likewise claim that the information supplied by the informants and Siciliani is insufficient. The Court finds that insofar as the affidavit is concerned the statements by informants meet both the credibility test and knowledge required under *Aguilar, supra* and *Spinelli, supra.* Siciliani's statement attached to the affidavit and the information furnished by him to the affiant was against his penal interest since it constituted an admission by him of his guilt following arrest. In *United States v. Squella-Avendano,* 447 F.2d 575, 583 (5th Cir.), *cert. denied,* 404 U.S. 985, 92 S.Ct. 450, 30 L.Ed.2d 369 (1971), the Fifth Circuit held that in the instance of a first-time informer wherein reliability may be problematic, the wealth of an informant's verified details can be considered in assessing his veracity and credibility. The judge issuing the wiretap therefore could consider that details supplied by Siciliani were corroborated and therefore an aid to establishing his credibility. *Spinelli v. United States,* 393 U.S. 410, 417-18, 89 S.Ct. 584, 589-590, 21 L.Ed.2d 637 (1969).

The Defendants next argue staleness. In fact, however, the affidavit details information commencing over two years prior to and up until mid-July 1980, for an application made on August 5, 1980. There are trash pickups with incriminating information described in the affidavit as late as July 13, 1980, and the murder on July 23, 1980, of a member of the organization who had been arrested in a May 5th drug incident, is revealed in the affidavit. The facts in the affidavit clearly evidence an ongoing criminal enterprise. It adequately alleges facts showing probable cause that matters which had occurred in the past would still be occurring, or would re-occur in the near future. In *Rodriguez, supra,* the Supreme Court of Florida suggested a 30-day rule of thumb for staleness but also stated that the issue of staleness cannot be solved by a simple application of numbers of days without consideration of the overall particular circumstances presented by the case at hand. *Rodriguez, supra* at 18. The staleness issue should be viewed more liberally when a continuing pattern of criminal activity is alleged, since the basic criteria as to the duration of probable cause is the inherent nature of the crime. *Bastida v. Henderson*, 487 F.2d 860, 864 (5th Cir.1973). *See also Hudson v. State*, 368 So.2d 899, 901-02 (3d DCA), *cert. denied*, 378 So.2d 345 (1979) (longstanding, ongoing pattern of criminal activity not likely to cease mysteriously within the previous several weeks). The period from mid-July to August 5, 1980, did not render the probable cause stale. *State v. Manning*, 379 So.2d 1307 (4th DCA), *cert. denied*, 388 So.2d 1115 (1980); *United States v. Hyde*, 574 F.2d 856, 865 (5th Cir.1978).

2. *Lack of Necessity.*

[35] Defendant Jernigan contends that the application fails to adequately demonstrate the necessity for wiretapping as opposed to less invasive investigatory procedures as required by Fla.Stat. §934.09(3). These restrictions are designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice. It is to be tested in a practical and common-sense fashion and does not require that all possible techniques be exhausted before a wiretap is authorized. *Hudson v. State, supra.* In *State v. Birs*, 394 So.2d 1054, (4th DCA 1981), the court noted that all that must be shown is that other reasonable investigative procedures have been tried and are either too dangerous, have failed, or are likely to fail. If other techniques have not been tried, the reasons as to why they reasonably appear unlikely to succeed must be demonstrated.

Judged against the foregoing standard, the allegations of pages 21-23 of Detective Sims' affidavit demonstrate the statutory necessity to resort to the wiretap. Sims discusses surveillance, immunity, search warrants and the use of infiltrators. These are not mere boiler-plate conclusions of

Sims, but are supported by specific details as to why those alternative methods were either unsuccessful in the past, would be unsuccessful in the future, or are too dangerous.

3. *Improper Authorization.*

[36] Jernigan contends that since this application was made by Detective Sims, with State Attorney Bludworth authorizing Sims to apply by means of an authorization letter, the application violated Fla.Stat §934.07, which provides that the Governor, Attorney General or any state attorney may authorize an application to a judge.

This very same contention was addressed in *State v. Birs*, 394 So.2d 1055, 1056 (4th DCA 1981), and in *State v. McGillicuddy*, 342 So.2d 567, 569-70 (2d DCA 1977), in which it was held that it is unnecessary for the state attorney to personally apply for the wiretap order as written authorization by a state attorney for another meets the statute's requirement that "any State Attorney may authorize. . . ."

Thus, this contention is without merit.

4. *First and Second Extension Orders Unlawful.*

Defendants argue that since the August 5 order was invalid, both of the extension orders were invalid as fruits of the poisonous tree. Since this Court has found that the original order was valid, this argument is therefore without merit as to the extensions.

Defendants contend that the application for the first and second extensions each lack probable cause, and that the information developed during the respective intervals of time does not reveal significant incriminating evidence. Each extension application is supported by the original application, affidavit and order, as well as information gleaned during the intervals. Taking each extension application within its totality of circumstances, there was ample evidence to establish probable cause for each extension in this ongoing, continuing criminal enterprise.

5. *No Authorization in Florida Statutes to Wiretap for Marijuana Offenses.*

[37] Harvey argues that a comparison of 18 U.S.C. §2516(2) and Fla.Stat §934.07 shows that the Florida legislature decided to omit marijuana from the offenses for which a wiretap could be obtained; that since the federal statute says "or dealing in narcotic drugs, marihuana or other dangerous drugs", it is clear that the Florida legislature intended to omit marihuana from the offenses for which authorization to intercept may be given.

However, although not addressing this specific issue, nevertheless Florida courts have upheld wiretaps based solely on information pertaining to marijuana. *See State v. McManus*, 404 So.2d 757, 758 (4th DCA 1981) and *State v. Manning*, 379 So.2d 1307, 1308 (4th DCA), *cert. denied*, 388 So.2d 1115 (1980). Also, Florida courts have recognized marijuana as a narcotic and dangerous drug. *Buttler v. State*, 238 So.2d 313, 314 (3d DCA 1970); *Williams v. State*, 293 So.2d 772 (3d DCA), *cert. denied*, 301 So.2d 778 (1974); *Borras v. State*, 229 So.2d 244 (Fla.1969), *cert. denied*, 400 U.S. 808, 91 S.Ct. 70, 27 L.Ed.2d 37 (1970). Moreover, the Florida Supreme Court in *Hamilton v. State*, 366 So.2d 8, 10 (Fla.1978) held that the legislature has discretion to include marijuana as a narcotic and along with other dangerous drugs. Thus, there was no need to include marijuana separately since the law in Florida is clearly that marijuana is a narcotic or other dangerous drug. Accordingly, the wiretap was conducted in connection with authorized offenses under Chapter 934.

6. *Whether §2517(5) was Violated Regarding the State Wiretap.*

[38] Defendant Harvey contends that an application and authorization order for disclosure of the product of the

state wiretap, said order obtained from a state judge on August 9, 1982, were inadequate under §2517(5), and therefore the product of the state wiretap should be excluded from use at the trial. The Defendant also argues that the testimony of a witness presented to the federal grand jury was evidence derived from the state wiretap, and since no authorization order for disclosure was obtained pursuant to §2517(5) prior to the witness' testimony, the Defendant contends that the indictment should be dismissed. For the reasons set forth below, the Court concludes that the Defendant's arguments are without merit. A review of the pertinent facts follows.

Upon an extensive and detailed affidavit/application, state Circuit Court Judge Tom Johnson entered an order on August 5, 1980, authorizing law enforcement officers of the Boca Raton, Florida Police Department to intercept wire communications of Defendant Robert Jernigan and other named individuals, including Defendant Harvey, on two specified telephone numbers. The application was made and authorization was granted pursuant to Fla. Stat. §934.01, *et seq.*, the Florida State analogue to Title III. The affidavit/application set forth probable cause to believe that communications would be intercepted relating to the state offense of possession, importation and distribution of marijuana of an organized nature or carried on as a conspiracy. The affidavit/application set forth information describing a large scale marijuana smuggling operation.

On September 3, 1980, based on a further affidavit/application which set forth additional information and the contents of intercepted communications, state Circuit Court Judge Carl Harper granted a 30-day extension of the interceptions. On October 3, 1980, based on a further affidavit/application which set forth additional information and the contents of additional intercepted communications, Judge Johnson granted an additional 30-day extension of the interceptions. The interceptions pursuant to the original authorization and extensions occurred between August 5 and October 10, 1980.

Boca Raton police ascertained from the state-authorized interceptions that an attempt would be made to bring a quantity of marijuana into the United States by boat at a boat ramp at Lantana, Florida. The state officers notified U.S. Customs Officers, who intercepted the boat at the Lantana boat ramp on October 2, 1980, and arrested Darryl Falls and James Snow.

During the evidentiary hearings held herein and in a written memorandum of law in response to the Defendant's attack on the state wiretap evidence, the Government proffered that Darryl Falls was charged with violations of state narcotics laws. The Government further proffers that on July 30, 1981, Falls entered a plea agreement on the state charges, and agreed to cooperate with state and federal officials in return for a lesser charge and sentence. On January 25, 1982, Falls was subpoenaed to testify before the federal grand jury that later returned the indictment in this case. The grand jury returned the indictment on February 9, 1982.

Pursuant to a Discovery Order entered by the United States Magistrate on March 18, 1982, the Government provided the defense with materials relating to the state wiretap. At a Status Conference held in open court on April 1, 1982, the Government announced its intention to use the intercepted communications from the state wiretap at the trial. On August 9, 1982, State Circuit Court Judge Tom Johnson granted, on the Government's application, an order authorizing use of the contents of the communications intercepted in the state wiretap in the trial of this case.

Defendant Harvey argues that the order authorizing use of the state wiretap evidence is insufficient, because the application submitted to Judge Johnson by the Government did not meet the requirements of §2518(1).[9] This argument presupposes that the requirements of §2518(1) apply to an application made under §2517(5). The Defendant has cited no case authority to support this proposition. The Fifth Circuit has specifically held that such an application need not be made upon oath or affirmation, which is one of the requirements of §2518(1). *In re Grand Jury Proceedings*, 554 F.2d 712, 714 (5th Cir.), *cert. denied*, 434 U.S. 892, 98 S.Ct. 269, 54 L.Ed.2d 178 (1977). This view is supported by the fact that §2517(5) on its face does not incorporate or refer to §2518(1), and §2517(5) itself imposes none of the requirements enumerated in §2518(1) on the application for authorization to disclose.

The Defendants have also argued that the authorization of the Attorney General is required pursuant to §2516 when authorization for disclosure is sought under §2517(5). Again, the Defendant cites no case authority for this proposition, and §2517(5) does not on its face so require. Section 2516 requires the authorization of the Attorney General only for an application for "an order authorizing or approving the interception of wire or oral communications," not for subsequent disclosure. Nor does the legislative history of the Act intimate an intent to impose the requirements of §2516 or §2518(1) on a §2517(5) application for authorization to disclose.[10]

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[9] Both parties agree that the requirements of the federal Act apply to determine whether authorization for disclosure of the contents of the state wiretap was necessary and sufficient. There has been some disagreement on this point in the reported decisions. *Compare United States v. Tortorello, supra,* 480 F.2d at 782 (holding the New York state wiretap statute controlling on this issue) *with United States v. Marion, supra,* 535 F.2d at 701-03 (holding that the requirements of Title III apply and must be satisfied). This Court adopts the view espoused in *Marion* and advocated by the parties here as the correct one. Where the contents of state electronic surveillance is sought to be used in a federal proceeding, the requirements of Title III as to use and disclosure are applicable. *Marion, supra,* 535 F.2d at 702; *see United States v. Nelligan,* 573 F.2d 251, 253 (5th Cir.1978). In the case *sub judice,* the provisions of the Florida state wiretap act and Title III relating to authorization for disclosure are nearly identical. *Compare* 18 U.S.C. §2517(5) *with* Fla.Stat. §934.08(5).

Defendant Harvey further contends that the authorization for disclosure granted by Judge Johnson is insufficient because it was not premised on a showing in the application for the disclosure order that the requirement of minimization was met in the state interceptions. This contention should be examined in the context of the purpose of §2517(5). As discussed, *supra*, §2517(5) was designed to prevent subterfuge searches in which the applicant would describe certain crimes in the original application, when in fact the applicant anticipated intercepting evidence of a different crime for which the prerequisites could not be satisfied. The legislative history indicates the subsequent application would include a showing that the original order was lawfully obtained, that it was sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order. S.Rep. No. 1097, *supra*, at 2189. The application to Judge Johnson and his subsequent order of August 9, 1982, satisfy this requirement and fulfill the purpose of §2517(5). Judge Johnson had granted the original authorization and the last extension order, and was thus familiar with the particular interceptions involved. In the extensive evidentiary hearings before this Court, there was no evidence adduced to suggest collusion between the federal and state investigators to undertake a subterfuge search. The authorization for disclosure executed by Judge Johnson satisfies the requirements of §2517(5).

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[10] The Defendant has noted that the Department of Justice Manual (Defendant's Exhibit No. 64, p. 45) states that it is the policy of the Attorney General that his authorization be obtained prior to application to a *federal court* for a disclosure order under §2517(5). The manual does not provide for such authorization prior to application to a state court for disclosure of the contents of state electronic surveillance. Moreover, as the Defendant concedes, the provisions of the manual are not binding on the Government; Title III is the standard which governs. *See United States v. Caceres*, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979).

The Defendant contends that the disclosure authorization was untimely under the requirement of §2517(5) that the application for such authorization be made "as soon as practicable." The Government was ordered to provide materials relating to the state wiretap to the Defendants in March, 1982.[11] The Government disclosed in a status conference on April 1, 1982, that it would seek to use the contents of the state wiretap at trial. The authorization for disclosure was obtained on August 9, 1982. The "as soon as practicable" requirement should be read in a common-sense fashion. *United States v. Marion, supra*, 535 F.2d at 707; *United States v. Aloi*, 449 F.Supp. 698, 715-16 (E.D.N.Y. 1977). The Court concludes that under the facts presented here, the "as soon as practicable" requirement of §2517(5) was met. *See United States v. Vento*, 533 F.2d 838, 855 (3d Cir.1976); *United States v. Pine*, 473 F.Supp. 349, 352 (D.Md.1978); *United States v. Aloi*, 449 F.Supp. 698, 715-16 (E.D.N.Y.1977); *United States v. Denisio*, 360 F.Supp. 715, 720 (D.Md.1973); *cf. United States v. Campagnuolo*, 556 F.2d 1209 (5th Cir.1977) (no violation of §2517(5) where disclosure order obtained prior to disclosure). The authorization order pursuant to §2517(5) was obtained prior to any prohibited use of the contents of the state wiretaps; the Defendants have suffered no prejudice.

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[11] Testimony at the evidentiary hearing established that although the contents of the state wiretap were unsealed in December, 1980, the federal investigators purposely refrained from learning the contents of the state wiretap until March, 1982, after the federal indictment was returned. The federal investigators sought to avoid any possibility of tainting the federal investigation if the state wiretap was subsequently found to be unlawful. Thus, although the state wiretap terminated in October, 1980, the Government did not learn of its contents until March, 1982. The "as soon as practicable" requirement should be viewed in this context.

[39] The Defendant contends that the testimony of Darryl Falls was evidence derived from the state wiretap, and therefore an authorization for disclosure under §2517(5) was required prior to Falls' testimony to the federal grand jury. Failure to secure such authorization prior to Falls' testimony in the Defendant's view requires dismissal of the indictment. The Court concludes that an authorization for disclosure was not required prior to Falls' appearance before the grand jury. The Court has examined, *in camera*, all transcripts of grand jury testimony by or from Darryl Falls, and other transcripts in which Falls' name is mentioned by another witness before the grand jury. In said transcripts there is no mention of or reference to the state investigation or electronic surveillance, nor is there reference to Falls' cooperation with state and/or federal officials in their investigations. No contents of the state wiretaps were disclosed to the grand jury.

Moreover, Falls' testimony was attenuated from the state interceptions such that the testimony was not evidence derived from the state wiretap within the meaning of §2517(5). Falls' testimony was the result of a plea agreement on state charges and his decision to cooperate with state and federal officials in their respective investigations. The fact that Falls' apprehension resulted from information supplied by the state interceptions does not mean that his testimony is "evidence derived" from the state interceptions within the meaning of §2517(5). *See United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *United States v. Hooton*, 662 F.2d 628, 631-33 (9th Cir.1981), *cert. denied*, 455 U.S. 1004, 102 S.Ct. 1640, 71 L.Ed.2d 873 (1982); *Passman v. Blackburn*, 652 F.2d 559, 565 (5th Cir.1981), *cert. denied*, 455 U.S. 1022, 102 S.Ct. 1722, 72 L.Ed.2d 141 (1982); *United States v. Houltin*, 566 F.2d 1027 (5th Cir.), *cert. denied*, 439 U.S. 826, 99 S.Ct. 97, 58 L.Ed.2d 118 (1978); *Smith v. United States*, 324 F.2d 879, 881-82 (D.C.Cir.1963), *cert. denied*, 377 U.S. 954, 84 S.Ct. 1632, 12 L.Ed.2d 498 (1964).

Even if a violation of §2517(5) occurred, the Act does not necessarily mandate suppression or dismissal of the indictment. Untimely or improper disclosure is not an enumerated basis for suppression under §2518(10)(a), nor does §2515 of the Act necessarily require dismissal of the indictment. *United States v. Rabstein*, 554 F.2d 190, 194, n. 6 (5th Cir.1977) (dicta); *United States v. Vento, supra*, 533 F.2d at 855; *United States v. Pine, supra*, 473 F.Supp. at 352; *United States v. Aloi, supra*, 449 F.Supp. at 718-23; *United States v. Denisio, supra*, 360 F.Supp. at 720; *see United States v. Donovan*, 429 U.S. 413, 432-34, 97 S.Ct. 658, 670-671, 50 L.Ed.2d 652 (1977); *United States v. Chavez*, 416 U.S. 562, 578, 94 S.Ct. 1849, 1857, 40 L.Ed.2d 380 (1974); *United States v. Giordano*, 416 U.S. 505, 527, 94 S.Ct. 1820, 1832, 40 L.Ed.2d 341 (1974).

The legislative history of the Act supports this conclusion. It provides that §2515 and §2517 must be read in light of §2518(10)(a). S.Rep. No. 1097, *supra*, at 2184-85, 2188. With regard to §2518(10)(a), the legislative history provides:

> This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. *Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual,* (*Blue v. United States*, 86 S.Ct. 1416, 384 U.S. 251 [16 L.Ed.2d 510] (1965).) *There is no intent to change this general rule*. It is the intent of the provison only that when a motion to suppress is granted in another context its scope may include use in a future grand jury proceeding.

S.Rep. No. 1097, *supra*, at 2195 (emphasis supplied); *United States v. Aloi, supra*, at 720-21. The Court is mindful of the need to strictly scrutinize Government conduct to assure compliance with Title III. Under the facts and circumstances presented here, however, even if a violation of §2517(5) had occurred, a proposition which the Court rejects, the drastic sanctions of suppression of the contents of the state wiretaps or dismissal of the indictment would not be warranted.

By reason of the aforegoing, it is

ORDERED AND ADJUDGED that each and every Motion to Suppress the Title III oral intercept, evidence derived therefrom, and the Florida state Chapter 934 wiretap, and evidence derived therefrom, submitted by and on behalf of each Defendant who is an "aggrieved person", is hereby DENIED.

ON MOTION TO VACATE RESTRAINING ORDER

This matter comes before the Court upon Defendant Harvey's Motion to Vacate Restraining Order and Alternative Motion for Adversary Hearing (docket No. 668). The Motion requests vacation of a February 10, 1982 restraining order which, by its terms, prevents the Defendant from selling, transferring, assigning, or otherwise disposing of any part of his beneficial interest in thirteen (13) listed and described assets during the pendency of the criminal proceedings against him. The thirteen assets comprise boats, real property, a Bell Jet Ranger helicopter, racing cars, trucks and luxury cars. The listed assets were allegedly purchased with profits accruing from the Defendant's alleged drug importation and distribution enterprise, in violation of the Continuing Criminal Enterprise (CCE) statute, 21 U.S.C. §848 (1976). Such profits and assets, upon a defendant's conviction, are subject to forfeiture under the Act. 21 U.S.C. §848(a).

Defendant Harvey and eighteen co-defendants were indicted on February 9, 1982, in a twenty-three count indictment charging Harvey with violations of Title 21, U.S.C. §§ 848, 963, 952(a), 846 and 841(a)(1), all of which are violations of the Drug Abuse and Control Act of 1970. Due to a ruptured disc in his spine and a concomitant need for surgery to correct this condition before he could undergo a lengthy trial, Defendant Harvey and one co-defendant were severed from the trial of their co-defendants, which commenced on September 8, 1982, and proceeded for eleven weeks, ending on November 27, 1982. Defendant Harvey's trial is presently scheduled to commence in the summer of 1983.

In view of the Defendant's instant motion and in consideration of the length of time which, by virtue of Defendant's surgery, must pass between the time the indictment was handed down and the time the Defendant will stand trial, the Court ordered an evidentiary hearing on the Motion to Vacate Restraining Order. On August 26th and 30th, 1982, the Court heard two days of testimony from four witnesses, received numerous exhibits into evidence, listened to sixteen (16) tape-recorded intercepted conversations of the Defendant concerning his activities, and entertained the argument of counsel. Based upon all the evidence adduced at the evidentiary hearing, the submissions of counsel, consideration of the applicable law, and having been otherwise fully advised in the premises, the Court hereby enters its Memorandum Opinion and Order which shall constitute its Findings of Fact and Conclusions of Law pursuant to Fed.R.Civ.P. 52(a).

On February 10, 1982, upon a sworn affidavit submitted by the United States Attorney describing Defendant Harvey's thirteen assets, asserting that they were purchased with drug profits, and alleging that the Defendant intended to dispose of them to avoid their forfeiture, the Honorable James W. Kehoe, United States District Judge, entered an Order restraining the Defendant, pending final disposition of the criminal charges against him, from directly or indirectly selling, assigning, pledging, distributing, or otherwise disposing of any part of his beneficial interest, direct or indirect, in the thirteen assets.

The authority of the District Court to issue an *ex parte* temporary restraining order of this type is derived from the Continuing Criminal Enterprise statute which provides, in pertinent part:

> The district courts of the United States . . . shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under their section, as they shall deem proper.

21 U.S.C. §848(d).

This section is essentially identical to a Racketeer Influence and Corrupt Organizations Act ("RICO") provisions, 18 U.S.C. §1963(b), whose legislative history describes its purpose as "to prevent the pre-conviction transfers of property to defeat the purpose of the [forfeiture penalty]" provided by Congress. S.Rep. 91-167, 91st Cong., 1st Sess. 160 (1969).

Little guidance, however, in the application of such restraining orders is found in the statutory history, and few reported cases address the use of CCE forfeiture provisions. No cases from either the Fifth or the Eleventh Circuit deal with the issues presented by Defendant's motion. Nevertheless, it is useful to consider the actions and holding of those few courts which have encountered similar problems in construing the CCE and RICO statutes.

After discussing the law established in Earlier Cases, the Court will then address evidentiary considerations attendant upon a hearing of this type. Finally, the Court will apply the standard of proof articulated in *United States v. Long,* 654 F.2d 911 (3d Cir.1981), to the merits of the restraining order.

Earlier Cases

In *United States v. Spilotro*, 680 F.2d 612 (9th Cir.1982), the defendant took an interlocutory appeal upon the district court's order setting a $180,000 performance bond before allowing the defendant to continue operation of his business, allegedly used in violation of RICO. The district court's order restrained the defendant from disposing of any title to, assets of, or interest in the business, but allowed its lawful and ordinary operation upon the posting of bond. The order on posting of the bond was entered after a hearing at which no evidence was received and pursuant to which no findings of fact or conclusions of law were set forth. *Id.* at 614-15. The Ninth Circuit held that under such a deprivation, "[b]ecause a RICO defendant's business may well constitute the source of a substantial portion of his livelihood, and because a restraining order such as the present one has the effect of halting business activity," a prompt hearing after entry of the initial *ex parte* restraining order was required. *Id.* The Court further held that although due process protections applied, *id.*, it was *not* necessary for the hearing to "duplicate the pending criminal trial." *Id.* at 618. The case was remanded to the district court for a full evidentiary hearing.

Much of *Spilotro's* reasoning was predicated upon the holding of *United States v. Crozier*, 674 F.2d 1293 (9th Cir.1982). In *Crozier*, an interlocutory appeal was granted after the district court, pursuant to 21 U.S.C. §848(d), entered an order restaining two defendants from selling or transferring jointly owned real property or from selling or transferring large amounts of jewelry and other personal property in which one or both had an interest. *Id.* at 1296. The order was issued without any hearing, before or after the order, and in spite of the fact that the second defendant was not charged with violating section 848. *Id.*

The court noted the irreparable harm that threatened the defendants, particularly the one not charged with a section 848 violation, and held that despite the exigent circumstances which may permit an *ex parte* restraining order, *see Boddie v. Connecticut*, 401 U.S. 371-79, 91 S.Ct. 780, 786-787, 28 L.Ed.2d 113 (1970), the government may not wait until trial to produce adequate grounds for the forfeiture. *Id.* at 1297. The court in these circumstances mandated the application of civil standards for a temporary restraining order, see F.R. Civ.P. 65, and set forth what determinations the district court must make in such a hearing. *Id.* at 1297-98. The case was remanded for a hearing.

United States v. Long, 654 F.2d 911 (3d Cir.1981), addresses several of the issues that arise from the CCE forfeiture provisions. In *Long*, the CCE defendant transferred title to an airplane, stated to have been worth $140,000, to his attorneys before an indictment was handed down against him. The transfer took place, however, when he was aware of the pending indictment and in exchange for past and future legal services in connection with the pending criminal charges. Pursuant to the CCE criminal forfeiture provisions, the government sought, and obtained, an *ex parte* restraining order against the airplane's sale, by either Long or his attorneys, and a $400,000 interim bond to secure performance of the order.

The *Long* district court held a full hearing before entering a restraining order under 21 U.S.C. §848(d), applying the following probable cause standard of proof: "[T]he government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the Continuing Criminal Enterprise statute and two, that the profits or properties at issue are subject to forfeiture under the provisions of section 848(a)(2)." *Long*, 654 F.2d at 915. At the hearing, the district court found that both tests were satisfied and held that the continued effectiveness of the restraining order and performance bond was warranted. *Id.*

On appeal, Long's attorneys contended that criminal forfeiture can apply only to profits or properties owned by the defendant at the time the restraining order was issued. The *Long* court rejected the argument, despite its attempt to apply the distinction between *in rem* and *in personam* forfeiture, *see id.* at 916; *United States v. Veon*, 538 F.Supp. 237, 241-42 (E.D.Cal.1982), on the ground that under these circumstances the transfer was a ruse intended to thwart the criminal forfeiture penalty intended by Congress. *Long*, 654 F.2d at 916.

A recent case from the Eastern District of California, in a learned opinion by Judge Lawrence K. Karlton, sets forth a judicial roadmap through the CCE and RICO forfeiture provisions. *United States v. Veon*, 538 F.Supp. 237 (E.D.Cal.1982); *see also United States v. Veon (Veon II)*, 549 F.Supp. 274 (E.D.Cal.1982). Judge Karlton held that the district court may enter an *ex parte* restraining order of brief duration, *id.* at 245, followed by an adversary hearing in which the burden of proof falls on the government. *Id.* The hearing must apply the *Long* standard of what the government must prove, *id.* at 246, and the degree of proof to the court requires application of the "preponderance of the evidence" standard. *Id.* at 247-48. Further, the Federal Rules of Evidence must be applied to the full hearing. *Id.* at 249.

The *Veon* court entered an *ex parte* order restaining the defendant's transfer of property. However, at the hearing that followed, "[t]he government declined to put on any admissible evidence that would support the continuing restraint of the property and the court dissolved the temporary restaining order." *Veon II*, 549 F.Supp. at 275.

For other discussions of CCE and/or RICO requirements, *see, generally, United States v. Mannino*, 635 F.2d 110 (2d Cir. 1980); *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980); *United States v. Thevis*, 474 F.Supp. 134 (N.D.Ga.1979);

United States v. Bello, 470 F.Supp. 723 (S.D.Cal.1979); *United States v. Meyers*, 432 F.Supp. 456 (W.D.Penn.1977); *United States v. Mandel*, 408 F.Supp. 679 (D.Md.1976), *aff'd in part and vacated on other grounds*, 591 F.2d 1347 (4th Cir.), *aff'd en banc*, 602 F.2d 653 (1979); *United States v. Scalzitti*, 408 F.Supp. 1014 (W.D.Pa.1975).

Evidentiary Hearing Considerations

[40] Prior to the August 26, 1982 hearing on Defendant Harvey's motion, the government gave the Court notice of its intention to use certain hearsay testimony in adducing evidence at the hearing. Upon due consideration and after receiving the government's representation that such testimony would be strictly limited, the Court held that hearsay testimony would be admissible in this type of preliminary proceeding for the purpose of meeting the *Long* standard of proof, discussed above. 654 F.2d at 915. In the Court's view, this holding is supported as a matter of law and as a matter of sound judicial policy, although there are holdings to the contrary. *Cf. United States v. Spilotro*, 680 F.2d 612, 619 n. 4 (9th Cir.1982); *United States v. Veon*, 538 F.Supp. 237, 249, 249 n. 20 (E.D.Cal.1982).

[41] Although section 848 makes no provision for a hearing on an *ex parte* restraining order and the Federal Rules of Criminal Procedure similarly make no provision, it is nevertheless a well-recognized requirement of Fifth Amendment due process that some kind of hearing be afforded when there is a "taking" or "deprivation" of property. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606, 95 S.Ct. 719, 722, 42 L.Ed.2d 751 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 79, 92 S.Ct. 1983, 1993, 32 L.Ed.2d 556 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1968).

Under the instant facts, it may well be the case that the effect of the *ex parte* order restraining the sale or transfer of defendant's property, but permitting every other kind of use, does not rise to the level of a "taking" or "deprivation" sufficient to trigger due process protections. In *United States v. Scalzitti*, 408 F.Supp. 1014, 1015 (W.D.Pa.1975), the court considered a motion to vacate an *ex parte* restraining order issued pursuant to the RICO statute. The court refused to consider the restraining order as a "taking":

> His contention that he has been deprived of his property without due process is premature. Although the statute contains a provision for forfeiture of property upon conviction, the merits of such a question cannot be examined hypothetically. At the present time, the restraining order serves only to maintain the *status quo* and this is neither illegal nor unconstitutional. Should the situation change and defendants desire to sell his business . . . or should a *bona fide* offer to buy the business be forthcoming, such facts may be presented to the Court on petition.

A similar situation exists in the present case. It is unlikely that there has been a "taking" such as normally invokes the due process right to a hearing prior to the taking. Nevertheless, so as to prevent possible arbitrary deprivation of property in the short run and "to follow a fair process of decisionmaking," *Fuentes v. Shevin*, 407 U.S. at 80, 92 S.Ct. at 1994, it is considered the better practice to grant a hearing after entry of the *ex parte* order. *Accord*, *Spilotro*, 680 F.2d at 617.

Necessarily, in view of the "extraordinary circumstances" surrounding the issuance of a restraining order under section 848(d) and the promotion of a "valid governmental interest" in avoiding a pre-order hearing, there is no cognizable due process violation in holding a hearing after issuance of the order. *See Fuentes v. Shevin*, 407 U.S. at 90, 92 S.Ct. at 1999; *Boddie v. Connecticut*, 401 U.S. at 378-79, 91 S.Ct. at 786-787; *Spilotro*, 680 F.2d at 617.

Having determined that some kind of hearing is warranted where there is a deprivation of a "significant property interest" implicating "possessory interests," *Fuentes*, 407 U.S. at 82, 84, 92 S.Ct. at 1995, 1996, and having assumed, *arguendo*, that Defendant's property interests are here implicated so as to require a hearing, it must be decided what kind of hearing need be afforded; what process is Defendant Harvey here due?

It has long been held that "due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case,' [citation omitted] and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any].' [citation omitted]." *Fuentes*, 407 U.S. at 82, 92 S.Ct. at 1995. (emphasis in original). Due process is thus not a fixed or rigid concept. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961).

In the present situation, the Court has carefully considered what form of hearing is appropriate in light of the necessarily preliminary nature of this hearing, the lack of an on-going business entity, the minimal degree of restraint imposed on the Defendant's property, and the broad range of protection and opportunity to be heard that is attendant upon a full-blown criminal jury trial. Bearing in mind that "[t]he fundamental requisite of due process of law is the opportunity to be heard," *Goss v. Lopez*, 419 U.S. 565, 577, 579, 95 S.Ct. 729, 737, 738, 42 L.Ed.2d 725 (1974), citing *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914), the Court undertook a full evidentiary hearing short of a duplicate trial, making only the exception of permitting the admission of heresay.

The subsequent criminal trial of Defendant Harvey will fully, and in compliance with all the Federal Rules of Evidence, reach every issue bearing on the *actual* forfeiture of his listed assets. The hearing on the restraining order does nothing more than preliminarily establish sufficient reason, under the *Long-Veon* test, to continue the minimal restraint in effect until a final jury decision can be made at trial.

The instant case differs significantly from the prior *Spilotro, Crozier* and *Veon* decisions. In *Spilotro*, no hearing was held before the district judge entered his order on the performance bond, the posting of which would allow defendants' *business* to reopen. Defendant Harvey's business or livelihood is not implicated by the restraint on his assets and the importance of his interests under *Fuentes* is thus significantly lessened.

In *Crozier*, the property of a defendant who was *not* charged with a CCE violation was restrained without any hearing whatsoever under the authority of section 848(d). Clearly, a full hearing was appropriate to determine, if nothing else, what property should not have come under the restraining order. That is certainly not the case here.

Finally, in *Veon*, the government produced *no* admissible evidence to support continuing the restraint. *Veon II*, 549 F.Supp. at 275. That situation differs from the instant action, wherein voluminous testimony and evidence were admitted without hearsay objections.

The nature of the hearing on a section 848(d) restraining order is one that determines whether the *status quo* of a property ought to be maintained pending final resolution at trial. It is, in effect, a probable cause type of hearing. As in a probable cause suppression hearing, the application of the Rules of Evidence is not required by due process. *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Allowing hearsay during suppression hearings avoids "exalt[ing] formalities over the fair and expeditious conduct of criminal trials." *United States v. De La Fuente*, 548 F.2d 528, 533 (5th Cir.1977). Other proceedings exempt from the strict rules of evidence are: sentencing, *United States v. Gonzalez*, 661 F.2d 488, 495 (5th Cir.1981); probation hearings, *Zannino v. Arnold*, 531 F.2d 687, 692 (3d Cir.1976); bail hearings, search warrants, *Matlock*, 415 U.S. at 174, 94 S.Ct. at 994; and juvenile bind-over hearings, *United States v. E.K.*, 471 F.Supp. 924, 929 (D.Or.1979).

An additional guide with regard to admission of hearsay testimony may be found by reference to civil forfeiture proceedings. Bearing in mind the preliminary posture of both the criminal and the civil proceedings. in an attempt to find probable cause for initiating a civil forfeiture action or, as here by analogy, continuing the restraining order in a case where criminal forfeiture is possible, the admission of hearsay testimony to establish probable cause was endorsed by the Fifth Circuit in *Bush v. United States*, 389 F.2d 485 (5th Cir.1968) citing *Ted's Motors v. United States*, 217 F.2d 777, 780 (8th Cir.1954):

> We have no doubt that information of guilt, *even though hearsay and incompetent with respect to the merits* of a case such as the instant one, may constitute probable cause or, in other words, a reasonable ground for a belief in guilt, justifying the institution of the action. Any other rule would seem to be illogical, unrealistic and opposed to everyday human experience. (Emphasis added)

In *United States v. Costello*, 350 U.S. 359, 364, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1971), the Supreme Court, in refusing to apply the evidentiary rules to grand jury proceedings, stated:

> In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

See also United States v. Calandra, 414 U.S. 338, 350, 94 S.Ct. 613, 621, 38 L.Ed.2d 561 (1974).

It is apparent from the volume of evidence amassed by the government that a "mini-trial" following all the rules of evidence would be exorbitantly costly in legal and judicial effort, particularly in relation to the limited interests sought to be protected. This conclusion was made all the more clear at the evidentiary hearing. Other than making a continuing hearsay objection, Defendant's counsel made thirty-three specific hearsay objections. Of the thirty-three objections, twenty-seven were founded purely on record-keeping or similar ministerial bases. All twenty-seven objections could have been cured, but only at the costs of meaningless examination and cross-examination of numerous record-keeping witnesses, the cross-examination of whom would in no way have added to the Court's search for the truth. *Cf.* V. Wigmore on Evidence, §1367, Chadbourn Revision (1974). Government counsel indicated that the proffer of financial analysis *alone* would have lasted no less than three weeks if every record-keeping witness were called. Therefore, having considered all of the foregoing in an attempt to devise a fair and expeditious method of addressing section 848(d) restraining orders consistent with the dictates of due process, it is concluded that admission of hearsay testimony in such a setting is permissible and such testimony may be considered in applying the *Long-Veon* test, 654 F.2d at 915; 538 F.Supp. at 247-48, for issuance of a preconviction restraining order.

Application of the Long-Veon Standard of Proof

[42] Turning now to the hearing itself, the Court heard testimony and tape-recordings and received evidence founded in the assumption that by a preponderance of the evidence the government must prove to the Court that it is likely to convince a jury, beyond a reasonable doubt, of two things: (1) that the defendant is guilty of violating the Continuing Criminal Enterprise Statute and, (2) that the profits or properties at issue are subject to forfeiture under the provisions of section 848(a)(2). *See Long*, 654 F.2d at 915; *Veon*, 538 F.Supp. 247-48.

Section 848 provides:

> [A] person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter [Title 21] the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

I. In order to establish a violation of the CCE Statute the government must prove that the defendant committed three or more federal narcotics law violations, as defined in subchapter I or II of Title 21. *United States v. Valenzuela*, 596 F.2d 1361 (9th Cir.1979). The government must prove that the defendant was an organizer, manager or person occupying a supervisory position, dealing in such a manner with five or more persons, and that he obtained substantial income or resources.

A close review of all the evidence adduced at the hearing makes clear that the government has met its burden of proof as to the first prong of the *Long-Veon* test. First, thirty bale lists, taken it a controlled trash pickup from the residence of Defendant Harvey, showed 53 latent fingerprints of the Defendant. The bale lists are contemporaneous notations of smuggling activity showing numbers of imported bales of contraband marijuana and to whom they are entrusted. Further, the government introduced into evidence and played sixteen intercepted and tape-recorded conversations of the Defendant which implicate him in extensive marijuana importation and distribution activities. The conversations are replete with references to persons clearly under the management or supervision of Defendant Harvey and to whom he is heard paying money for their services.* (See, e.g., Reel 2 Meter 690-787, pp. 5-10, conversation of Nov. 21, 1980).

On Reel 27, Meter 321-550, p. 8, conversation of Nov. 18, 1980, Harvey discusses $235,000 in payments to him for marijuana and how he is owed $198,000. On Reel 26, Meter 215-547, p. 65, conversation of Nov. 18, 1980, Harvey states, with reference to marijuana smuggled, that "I run [sic] over a hundred thousand pounds in over that weekend." (Other testimony at the hearing showed that the wholesale price per pound of marijuana in Southern Florida in late 1980 was between $220 and $250 a pound.)

On Reel 2, Meter 79-1000, p. 18, conversation of Nov. 21, 1980, Harvey states that he has put $100,000 in marked money in his house in some scheme intended to show how police, who apparently would find and confiscate it, would not turn in all the money they confiscated.

On December 9, 1980, Harvey and other co-defendants discussed how much marijuana or money Harvey is owed; the dialogue is as follows: Harvey: "What does he owe me? Answer: He owes you 452475. That's at 2 and a quarter, right." Reel 21, Meter 061-140, p. 4, Dec. 9, 1980. Numerous other conversations discuss marijuana importations and distribution plans. See, e.g., Reel 23, Meter 107-108, pp. 1-3, Dec. 10, 1980; Reel 26, Meter 215-547, p. 51, Nov. 18, 1980; Reel 24, Meter 050-092, p. 5, Dec. 10, 1980. On December 30,

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*Since the evidentiary hearing was held in this matter, the Court, over an 11-week-span, has conducted the trial of ten co-defendants of Defendant Harvey. During this period, scores of self-incriminating conversations of the Defendant were heard in a jury trial setting.

1980, in a dialogue with co-defendant Robert Gainer Jernigan, Jernigan states that he owes Harvey $477,710. Reel 11, Meter 259-320, p. 2.

It is thus apparent that the government has shown the Court by a preponderance of the evidence that it will likely convince a jury, beyond a reasonable doubt, that Harvey committed three or more federal narcotics violations in concert with five or more persons; that Harvey acted as a supervisor or manager of those persons; and that he obtained substantial income or resources as a result of this conduct.

II. The second prong of the *Long* test requires the government to show that the assets listed in the February 10, 1982 restraining order are subject to forfeiture under 21 U.S.C. §848(a)(2), which provides:

> Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—
>
> > (A) the profits obtained by him in such enterprise, and
> >
> > (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

In attempting to prove that the profits of Defendant Harvey's continuing criminal enterprise are found in the thirteen listed assets, the government has attempted to show a substantial increase in the Defendant's net worth, an increase that cannot be attributed to legitimate sources of income. The validity of this "net worth" theory of proof has been approved in taxation cases. *See Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); *Sasser v. United States*, 208 F.2d 535 (5th Cir.1953). Thus, if the government shows a substantial net worth increase and there is no legitimate source for such increase, it is valid to draw an inference that the increase constitutes unreported income, and, in this instance, income from Defendant Harvey's narcotics enterprise. A further inference may attribute the money attendant upon a substantial net worth increase to property purchased contemporaneously. Such property is forfeitable under section 848(a)(2). *United States v. Mannino*, 635 F.2d 110 (2d Cir.1980).

Other cases have not relied on a net worth theory, but have viewed evidence of cash expenditures as showing profit from the enterprise. *See United States v. Bolts*, 558 F.2d 316, 319, 321 (5th Cir.1977) (thousands of dollars changing hands); *United States v. Jeffers*, 532 F.2d 1101, 1104 (7th Cir.1976) (payment of employees); *Long*, 654 F.2d at 912-13, 913 n. 1 (purchase of airplanes, a 65 foot yacht, and three cars); *United States v. Chagra*, 669 F.2d 241, 256 (5th Cir.1982) (purchase of expensive homes).

In the instant case, the government has shown, through its intercepted tape-recorded conversations, that Harvey has received substantial income from his narcotics enterprise. This income undoubtedly made its way to the assets presently restrained. In so proving beyond a reasonable doubt, the net worth analysis undertaken by the government comprised a broad and in-depth financial investigation of Defendant Harvey. Defendant's personal and corporate books and records were examined, numerous interviews were conducted, bank account records were reviewed and Defendant's personal and corporate tax returns dissected. Real property records and records with the Department of Motor Vehicles, Department of Natural Resources, Federal Aviation Administration, and the U.S. Coast Guard were checked and the intercepted conversations again reviewed.

When Harvey was released from prison in 1976, his initial net worth was established as zero. No evidence of cash hoards or other undisclosed substantial assets was adduced, and in the absence of such information, none can be assumed. *See Hayes v. United States*, 407 F.2d 189 (5th Cir.1969). Thus, with reasonable certainty it can be presumed that the Defendant's accumulation of wealth began after he was released from prison.

In 1976, his income was approximately $8500; his 1977 return showed approximately $12,800 in income. The estimated 1978 income, determined from prior and subsequent income, was $20,000 to $22,000. The estimated 1978 income from unknown sources was $389,000. His established 1978 net worth was aproximately $204,000.

In 1979, Harvey's known source income was approximately $8,000; his unknown source income was in excess of two million dollars. His 1979 expenditures were calculated at approximately $960,000. His 1979 net worth was over $1.58 million, an increase of $1.38 million from 1978.

The financial analysis indicated that in the 1976 to 1982 period, Harvey had between $100,000 and $120,000 in known source income. During that same period, income from unknown sources, his narcotics enterprise, was calculated at $4.5 million. Each of the thirteen assets listed in the restraining order has been unequivocally associated with Defendant Harvey, either having been purchased by him, used so regularly by him as to indicate ownership, or registered to him, his wife or one of the corporations wholly owned and controlled by him. The purchase dates, where available, for the assets indicate that the assets were acquired during the course of his narcotics enterprise activity. Thus, the evidence is clear that Harvey's substantial income, derived from a continuing criminal enterprise, was channelled, in part, into the purchase of the assets listed in the restraining order.

Further support for this conclusion is derived from the Defendant's own mouth, and it provides compelling reason to continue the restraining order in effect. On January 6, 1981, Harvey, aware that he was the target of an F.B.I. investigation, and obviously aware of the forfeiture provisions of the federal narcotics laws, discussed in detail his arrangements for disposing of his property and moving from South Florida. His relevant statements are as follows: "The boat should be gone by the weekend. I'm sellin [sic] the boat. . . . You know how worried I am. My both Mercedes are goin [sic] by Friday. My Bronco I'm gonna sell to your son, I'm buyin [sic] a station wagon and I'm movin [sic] probably by [sic] in two weeks. That's how worried I am right now. . . . They [F.B.I.] get wind I'm sellin [sic] this [property], they're gonna come take it on me . . . They [F.B.I.] want anything they can get from me just to blow it up in the newspaper. When it comes time they ain't gonna be able to get nothin [sic] from me. . . . The move is to sell everything and not to nobody I know. . . . They're takin [sic] everything, in my wife's name, in my, her maiden name, they're gettin [sic] everything. . . . I won't buy nothin [sic] right now. I got a lot of [property] I gotta get rid of. I've been on the phone all night sellin [sic] race cars." Reel 19, Meter 56-95, pp. 1-5, conversation of Jan. 6, 1981.

It is well-settled law that the flight of an accused, as Harvey was preparing to do, is competent evidence against him as having a tendency to establish guilt. *Allen v. United States*, 164 U.S. 492, 499, 17 S.Ct. 154, 156, 41 L.Ed. 528 (1896); *United States v. Ballard*, 423 F.2d 127 (5th Cir.1970). When all the evidence adduced at the hearing is weighed pursuant to the *Long-Veon* standard for continuing a section 848 restraining order, it is apparent that the government has more than met its burden. Defendant Harvey's substantial income from his narcotics enterprise has been convincingly demonstrated, the application of the income to the restrained assets has been shown, ownership (or, at the very least, control) of the restrained assets has been attributed to Harvey, and his efforts to frustrate federal forfeiture provisions have been revealed in no uncertain terms.

Obviously, the application of any or all of the principles of law previously stated is appropriate, and, indeed must be implemented, on a case-by-case basis. The Court has so applied the law to the facts of this case. It should be further noted that on the basis of factual circumstances, the Court has carefully distinguished the *Crozier, Spiotro*, and *Veon* cases from the one *sub judice*, has, accordingly, come to its conclusions.

In view or all the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Motion to Vacate Restraining Order be, and the same is, hereby DENIED. The Restraining Order of February 10, 1982, is hereby incorporated into this Order and it shall remain in full force and effect until further Order of this Court.

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscence matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in

contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or rackteering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged, in or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections[1] (a), (b), or (c) of this section.

(Added Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 942.)

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of

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[1] So in original. Probably should be "subsection".

imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal of interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative

provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(Added Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95-575, §3(c), Nov. 2, 1978, 92 Stat. 2465; Pub.L. 95-598, Title III, §314(g), Nov. 6, 1978, 92 Stat. 2677).

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

> (1) real property, including things growing on, affixed to, and found in land; and
>
> (2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

[(d) Repealed. Pub.L. 98-473, Title II, §2301(b), Oct. 12, 1984, 98 Stat. 2192]

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

> (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
>
> (B) prior to the filing of such an indictment or information, if, after notice to persons appearing

to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the dispositon of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or dispositon of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, incuding expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the dispositon by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation or forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may —

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remissions or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be

held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall

have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)

(As amended Pub.L. 98-473, Title II, §§ 302, 2301(a)-(c), Oct. 12, 1984, 98 Stat. 2040, 2192.)

* * * *

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

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(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 112.

* * *

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 216.

* * *

§2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral

communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise

intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 217.

* * *

§2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that –

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication under this chapter shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists that involves—

(1) immediate danger of death or serious physical injury to any person,

(11) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire or oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 218.

TITLE 21

FOOD AND DRUGS

CHAPTER 13—DRUG ABUSE PREVENTION AND CONTROL

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

* * *

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.)

* * *

§ 848. Continuing criminal enterprise

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in section 853 of this title.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

(Pub. L. 91-513, Title II, §408, Oct. 27, 1970, 84 Stat. 1265; Pub. L. 98-473, Title II, §305, Oct. 12, 1984, 98 Stat. 2030, 2050.)

* * *

§ 952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title, or

(C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

* * *

§ 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91-513, Title III, §1013, Oct. 27, 1970, 84 Stat. 1291.)